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## Perjury! The Charges and the Defenses

*Richard H. Underwood\**

His disciples questioned him and said to him, "Do you want us to fast? How shall we pray? Shall we give alms? What diet shall we observe?" Jesus said, "Do not tell lies, and do not do what you hate, for all things are plain in the sight of Heaven. For nothing hidden will not become manifest, and nothing covered will remain without being uncovered."

*The Gospel of Thomas*<sup>1</sup>

In *Nástrond* [Hell] I saw the perjurers.

*Volospá* (old Norse epic), line 39<sup>2</sup>

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1. THE OTHER BIBLE: ANCIENT ESOTERIC TEXTS 300 (Willis Barnstone, ed., 1984). See also MARVIN W. MEYER, THE SECRET SAYINGS OF JESUS: FOUR Gnostic GOSPELS 20-21 (1984). *The Gospel of Thomas* is said to be a part of *Codex II*, one of the Nag Hammadi manuscripts. *Id.* at 32-34.

2. Quoted in C.S. LEWIS, THE ABOLITION OF MAN 112 (1947) (reprinted in 1955).

## INTRODUCTION

The law of man is somewhat more complicated than the simple guide set forth in *The Gospel of Thomas*. It is also wanting of enforcement. There may be a lot of perjurers in *Nástrond*, but there are relatively few in earthly "slammers." A 1995 article in the *American Bar Association Journal* quotes judges and lawyers to the effect that "perjury is being committed with greater frequency and impunity than ever before," but that prosecution of perjury "is a low priority for resource-strapped prosecutors just when it is apparently on the rise."<sup>3</sup> Perjury "undermines the whole process . . . [but] . . . [t]he problem is so bad that it is severely evaporating confidence people have in the court system."<sup>4</sup> Judges say that "more lawyers appearing before them are bending the truth, not telling the whole truth, or just plain lying about everything from discovery to the holdings of prior decisions."<sup>5</sup> These problems are not confined to the criminal courts. One prosecutor is quoted as saying that "[i]f perjury were water, the people in civil court would be drowning. And if I were to prosecute all the perjury cases just in civil courts, I would tie up five prosecutors full time."<sup>6</sup> Many lawyers answer that all of this is the natural result, and the tolerable cost, of an adversary system of justice,<sup>7</sup> but the "professional excuse" is wearing a little thin.

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3. Mark Curriden, *The Lies Have It: Judges Maintain That Perjury Is on the Rise, but the Court System May Not Have Enough Resources to Stem the Tide*, ABAJ, May 1995, at 68. See also Jonathan Liebman and Joel Cohen, *Perjury and Civil Litigation*, 20 LITIG. 43 (1994).

[B]usy prosecutors often disdain involvement in civil cases. They believe (sometimes correctly) that civil litigators try to enlist prosecutors for private purposes; prosecutors do not relish being in the middle of civil disputes . . . [and] . . . unless civil perjury affects a government interest or an ongoing criminal investigation, prosecutors often conclude that society's interests would be better served devoting limited prosecutorial resources to pursuing other crimes, instead of promoting truth-telling in civil litigation.

*Id.* at 44-45; Lisa Harris, *Perjury Defeats Justice*, 42 WAYNE L. REV. 1755 (1996) ("[P]erjury has thus far evaded all solutions, is pervasive in the courtroom, and is on the increase."). *Id.* at 1755.

4. Curriden, *supra* note 3, at 69 (quoting David C. Weiner, ABA Litigation Section Chair).

5. *Id.* at 70 (citing interviews with sitting judges).

6. *Id.* (quoting Milwaukee prosecutor, E. Michael McCann).

7. Cf. Dan B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183 (1971) The lying witness is one of the things the system is designed to cope with through devices such as cross-examination . . . We expect trials to involve issues of fact and, pretty regularly, a certain amount of lying under oath. We can cope with it by

I have traced the history of perjury, right up to current federal law, in other articles.<sup>8</sup> Here, I take a closer look at the federal perjury statutes, take a quick glance at the law of a rural state out in the "heartland," and then say a few more words about enforcement. I hope to address the subject of professional ethics another day.

### THE CHARGES

Emilia: You told a lie, an odious, damned lie,  
Upon my soul, a lie, a wicked lie!

William Shakespeare, *Othello*,  
Act V., sc. ii., lines 180-81

Shallow: I will make a Star-chamber matter of it.

William Shakespeare, *The Merry Wives  
of Windsor*, Act I., sc. i., lines 1-2

Here are the modern American<sup>9</sup> [federal] perjury statutes:

Section 1621. Perjury generally  
Whoever —

- (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or
- (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

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cross-examination, the use of other testimony, and the common sense of the trier of fact. . . . [T]he system can and does work with perjury and in fact is designed to do so.

*Id.* at 194.

8. See, e.g., Richard H. Underwood, *False Witness: A Lawyer's History of the Law of Perjury*, 10 ARIZ. J. INT'L & COMP. L. 215 (1993) ("False Witness"); Richard H. Underwood, *Perjury: An Anthology*, 13 ARIZ. J. INT'L & COMP. L. 307 (1996) ("Anthology").

9. Originally, this article was written for a foreign audience.

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than \$2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.<sup>10</sup>

Section 1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the

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10. 18 U.S.C. § 1621 (1984 & West Supp. 1998).

declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.<sup>11</sup>

#### PROCEEDINGS TO WHICH THE PERJURY STATUTES ARE APPLICABLE

Both the "general" or "old" perjury statute, 18 U.S.C. section 1621, and the "new" perjury statute, 18 U.S.C. section 1623, make the taking of an "oath" an element of the crime of perjury. Under section 1621, the oath must be taken before a competent<sup>12</sup> "officer, tribunal, or person," whereas, under section 1623, the oath must be taken before or ancillary to a proceeding before a United States court or grand jury.<sup>13</sup> In other words, the geographical reach of the "general" perjury statute is greater, in the sense that section 1621 punishes perjury in congressional hearings whereas section 1623 does not.<sup>14</sup> On the other hand, under section 1621, there must be proof that the oath was administered by one competent and

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11. 18 U.S.C. § 1623 (1984 & West Supp. 1998).

12. *United States v. Reinecke*, 524 F.2d 435 (D.C. Cir. 1975) (conviction of California Lieutenant Governor who testified falsely before a Senate panel reviewing nomination of Richard Klienendienst for Attorney General of the United States was later reversed because there had not been a proper quorum at the time the testimony was taken). See Underwood, *Anthology*, *supra* note 8, at 367. See also *United States v. Weissman*, (unpublished disposition) 1996 WL 742844 (S.D.N.Y., Dec. 20, 1996) (discussion of oath, competency of tribunal, and other issues; charges of perjury in deposition testimony given to Senate subcommittee staff members and testimony before subcommittee).

13. In *United States v. McAfee*, the court held that section 1623 applies to depositions in civil cases. *McAfee*, 8 F.3d 1010 (5th Cir. 1993). In *Dunn v. United States*, however, the Supreme Court of the United States held that the statute does not apply to the taking of an affidavit in a lawyer's office. *Dunn*, 442 U.S. 100 (1979). But in *United States v. Tibbs*, the court found that if the affidavit were filed or used in some way in a proceeding, the statute would apply. *Tibbs*, 600 F.2d 19 (6th Cir. 1979).

14. A memorable case in point is *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied, sub nom. Erlichman v. United States*, 431 U.S. 933 (1977). See "The Sorry Case of the President's Men" in Underwood, *Anthology*, *supra* note 8, at 307. See also Seymour Glazer, *Congressional Investigations*, 134 PLICRIM. 21 (1984).

authorized to do so; whereas, in prosecutions under section 1623, an inference might be drawn that the defendant testified under oath since the statute is limited to statements made in court or grand jury proceedings, or "ancillary" thereto.<sup>15</sup>

If the perjury is before a court, the court must have jurisdiction over the subject matter, at least at the outset.<sup>16</sup> Insofar as grand juries are concerned, it has been held that if the perjury were committed after the grand jury exceeded its term, then the tribunal was incompetent at the critical time.<sup>17</sup> Attacks based on the subject matter of a grand jury's inquiry — that the grand jury could not indict in the matters under investigation — are *sometimes* successful.<sup>18</sup>

### THE OATH: FORM AND FUNCTION

How useless oaths are has been shown by experience, for every judge will bear me out when I say that no oath has ever yet made any criminal speak the truth; and the same thing is shown by reason, which declares all laws to be useless, and consequently injurious which are opposed to the natural sentiments of man.

Cesare Bonesana Di Beccaria,  
*On Crimes and Punishments*  
(1764)

Trust none, For oaths are straws . . .

William Shakespeare, *Henry V*,  
Act II., sc. iii, lines 52-53

There have been many interesting cases dealing with the form of the oath, although they deal with the question of whether the witness should be permitted to testify, and not, strictly speaking, with whether the oath was sufficient to support a prosecution for perjury. Nevertheless, it is hard to see why the question of "sufficiency" is not the very same.

A witness may "affirm" rather than swear. But the law is even more accommodating than that, since religious objections have also

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15. See *United States v. Molinares*, 700 F.2d 647, 650-651 (11th Cir. 1983) for further discussion.

16. *United States v. Williams*, 341 U.S. 58 (1951).

17. *United States v. Fein*, 504 F.2d 1170 (2d Cir. 1974).

18. See James Neslund, *Perjury and False Declarations*, in *WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES* 10-7 (Otto G. Obermeier and Robert G. Mervillo, eds., 1990).

been raised to "affirmation."<sup>19</sup> The intent of the law is that the witness acknowledge that he or she will undertake to tell the truth under penalty of perjury.<sup>20</sup> It has been held sufficient that a witness "declare that the facts [he/she is] about to give are, to the best of [his/her] knowledge and belief, accurate, correct, and complete."<sup>21</sup>

In another case, an appellate court vindicated a witness' demand that he be permitted to take an "alternative" oath that read, "Do you affirm to speak with fully integrated Honesty, only with fully integrated Honesty and nothing but fully integrated Honesty?" For reasons that the court "[would] not attempt to explain," the witness "believed] that honesty is superior to truth."<sup>22</sup> "We do not have a case where the witness offers to swear only to a cleverly worded oath that creates loopholes for falsehood or attempts to create a safe harbor for perjury."<sup>23</sup>

#### FALSITY

A truth that's told with bad intent  
beats all the lies you can invent.

William Blake, *Auguries of Innocence*,  
lines 53-54 (c. 1803)

It seems obvious that for a defendant to be convicted of perjury, the statements<sup>24</sup> made by the defendant that are the basis of the

19. *Ferguson v. Commissioner*, 921 F.2d 588 (5th Cir. 1991).

20. See FED. R. EVID. 603; FED. R. EVID. 603 (Advisory Committee Notes); *Gordon v. Idaho*, 778 F.2d 1397, 1400 (9th Cir. 1985).

21. *Ferguson*, 921 F.2d at 589 (citing *Staton v. Fought*, 486 So. 2d 745 (La. 1986)). In *Ferguson*, the witness was prevented from giving testimony before the Tax Court although she was willing to give the declaration set forth in *Staton* and even add an additional sentence acknowledging that she was subject to the penalty for perjury. The United States Court of Appeals for the Fifth Circuit ruled that the Tax Court's exclusion of her testimony and dismissal of her petition for lack of prosecution was an abuse of discretion. *Id.* at 590-91.

22. *United States v. Ward*, 973 F.2d 730, 731 (9th Cir. 1992). The court pointed out that liberality as regards the adequacy of the oath predates the American Constitution (citing *Omichund v. Barker*, 1 Atk. 22, 45 (1744)). *Id.* at 733-34.

There are limits, however. See *Judge: No Death Ceremony in Court*, LEXINGTON [KY.] HERALD-LEADER, Dec. 13, 1997, at A11 (Judge Harry Crumo, in Minneapolis, would not allow a Hmong woman, Yer Vang, to perform a native ceremony in court that would have "caused the death of anyone who lied in the case.").

23. *Id.* at 734. *United States v. Fowler*, 605 F.2d 181 (5th Cir. 1979) is a frequently cited case of evasion. In *Fowler*, the witness (defendant) would only say "I am a truthful man" or "I would not tell a lie to stay out of jail." He refused to say, "I state that I will tell the truth in my testimony." *Id.* at 185.

24. I have already noted that section 1621 has a broader "geographical" reach than section 1623. See *supra* note 14 and accompanying text. Section 1621 is narrower in that it



charge must be proved to have been false, and the proof must meet the criminal burden of proof "beyond a reasonable doubt."<sup>25</sup> It is sometimes suggested that proof that the defendant told the literal truth, while, perhaps, hoping to mislead, is a *defense* to a perjury charge under 18 U.S.C. sections 1621 and 1623, and under 18 U.S.C. section 1001. Indeed, I will follow this convention.<sup>26</sup> However, it is important to remember that *the burden of proving falsity remains with the prosecution*. The point was made in a case involving a county judge in Texas, who claimed that money he took was for legal services.<sup>27</sup> His strategy was to claim that since he was a lawyer, and that he claimed to have performed some legal services for the money, that the government could not prove that all of the money was not for legal services. They could not prove that he didn't simply overcharge. Even if overcharging can reach the point where it is criminal, overcharging is not perjury. The Fifth Circuit conceded the principle that the burden of proof on the issue of falsity remains on the prosecution "side of the v." — but affirmed the judge's conviction anyway. His may have been a pyrrhic victory; but we thank his former honor, nonetheless, for his instructions regarding the legal technicalities.<sup>28</sup> They come in handy from time to time, as we shall see in our discussion of "literal truth."

Indeed, there is good reason for making prosecutions for perjury difficult. We do not want witnesses to be discouraged from giving evidence.<sup>29</sup> "A false answer may be given because of inadvertence,

applies only to false statements and subscriptions, whereas section 1623 applies when a witness "makes or uses" (enters, alludes to, or otherwise incorporates into the testimony) *false information or false materials* (false exhibits, documents, records, or other evidence) that contain a false material declaration. For a collection of cases discussing this issue, see Angel Saad, *Perjury*, 34 AM. CRIM. L. REV. 857, 862 n.30 (1997). It would seem then that the defendant who creates false documentary evidence and uses it in grand jury testimony will run afoul of section 1623 as well as violate the obstruction of justice statutes. Compare Brendan V. Sullivan, Jr., *Grand Jury Practice*, 137 PLI/CRIM. 111 (1985). Among the cases collected by Saad is *United States v. Pommerening*, 500 F.2d 92 (10th Cir. 1974) in which the defendants removed incriminating evidence from the corporate records and then relied upon falsified records when they appeared before the grand jury).

25. *United States v. Martellano*, 675 F.2d 940 (7th Cir. 1981).

26. Compare Neslund, *supra* note 18, at 10-15. For a yearly survey of the cases involving the federal law of perjury, see Symposium, *White Collar Crime Project — Perjury*, published in AM. CRIM. L. REV. (Georgetown U. Law Center). The author recently had the pleasure of serving as an outside "reviewer" for the "WCCP."

27. *United States v. Parr*, 516 F.2d 458 (5th Cir. 1975).

28. I am reminded of a cartoon that is probably still on my door (in one of the layers) in which a former big-wig, now jailbird, is lamenting to his lawyer something to the effect of — "I don't believe that my integrity would ever have been questioned if I hadn't been caught."

29. *United States v. Lighte*, 782 F.2d 367, 372 (2d Cir. 1986).

honest mistake, carelessness, neglect, or misunderstanding. . . ."<sup>30</sup>  
 "Under the pressures of interrogation, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it. . . ."<sup>31</sup>

In prosecutions predicated upon false statements made before a grand jury, it must be remembered that the witness will not have had counsel's advice in the grand jury room. It's the prosecutor's turf. The prosecutor's questioning may consist entirely of leading questions, and the prosecution may be founded upon the witness' guarded responses to these questions.<sup>32</sup> "This kind of interrogation always creates a great risk that the witness will misunderstand the questions or that the prosecutor will put words in the witness' mouth."<sup>33</sup> The same caveat may be in order when a witness is charged with committing perjury in his or her responses to leading questions in cross-examination. Indeed, one noted defense counsel has asserted that "any witness will lie under repeated cross-examination."<sup>34</sup> At least one court has cautioned that a grand jury witness who does not have counsel beside him or her "ought to be given a fair opportunity to respond fully to questions and not be limited to the 'yes' or 'no' that typifies answers to leading questions."<sup>35</sup>

30. *Martellano*, 675 F.2d at 942.

31. *United States v. Eddy*, 737 F.2d 564, 570 (6th Cir. 1984).

32. See *infra* notes 64 & 158-163 and accompanying text for a discussion of the so-called "perjury trap."

It is a separate crime to lie to a grand jury. Perjury charges may be brought by the government in the event false testimony is given. Prosecutors may actually hope for perjured testimony in cases where the government has difficulty making the underlying substantive charge. . . . If the witness is a putative defendant, there is a high risk that a perjury count will be added to the indictment, since the prosecutor undoubtedly will believe witnesses who testify differently than the client. . . . In a complex case where the decision to prosecute is a close one, the government may actually hope that the client will testify in order to give them a simpler case, i.e., perjury.

Sullivan, *supra* note 24, at 115, 123.

33. *United States v. Boberg*, 565 F.2d 1059 (8th Cir. 1977). Of course, the same may be said for investigatory interrogations. Regarding investigatory interrogations and interrogator's lies, see Margaret L. Paris, *Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3 (1996). Note that the "defense" of "literal truth" (discussed *infra* at notes 35, 56, 90-106, 112, 119-20, 298), is available not only in perjury cases, but also in prosecutions under 18 U.S.C. section 1001. See, e.g., *United States v. Milton*, 8 F.3d 39 (D.C. Cir. 1994).

34. J.W. EHRLICH, *THE LOST ART OF CROSS-EXAMINATION* 191 (1970).

35. *Boberg*, 565 F.2d at 1062. It is important to note that "a perjury prosecution will not lie where the defendant is asked if he previously gave certain testimony, and he confirms

Still, concern that the defendant might have been honestly mistaken or misled sometimes seems to reach a level of absurdity. In *United States v. Eddy*,<sup>36</sup> the defendant was charged with having given false testimony while being cross-examined during an *in camera* hearing. Specifically, the United States Attorney was trying to prove that Eddy had used an Ohio State University College of Medicine diploma and an Ohio State University college transcript in an effort to enlist as a doctor in the Navy.<sup>37</sup> Here are the questions and answers:

Q: Are you the same Terrence Allan Eddy that, on or about March 20, 1981, contacted the Navy Medical Programs recruiter for the Navy Recruiting District of Jacksonville, Florida?

A: Yes, Sir.

Q: Claiming to be a doctor graduated from the Ohio State University School of Medicine?

A: No, sir.

Q: And expressing a desire to join the Navy as a doctor?

A: No, sir.

Q: And as proof or as part of your personal history submitted a diploma from the Ohio State University College of Medicine?

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that he did . . . when a defendant accurately characterizes an earlier statement, his testimony is literally true, even though the statement he has quoted may not be." *Id.* But if the witness goes beyond a mere reiteration, but expresses his agreement with the content of the prior testimony, then the witness is in trouble. *United States v. Weissman*, (unpublished disposition) 1996 WL 742844 at \*15 (S.D.N.Y., Dec. 20, 1996) (emphasis added). See also *United States v. Landau*, 737 F. Supp. 778, 784 (S.D.N.Y. 1990) (when the question begins with the phrase "you've told us," the defendant is merely being asked to reiterate prior testimony).

Back during the Watergate goings-on, a false declaration indictment against lawyer Jake Jacobsen was dismissed on the ground that he had given an answer that was the literal truth. He was asked by an inquiring prosecutor, "And is it your testimony that the \$10,000 was the \$10,000 which you put into that [safe deposit] box within a number of weeks after it was given to you by Mr. [Robert] Lilly [an AMPI executive] and it was untouched by you between then and the time you looked at it with the FBI agent [on Nov. 27, 1973]?" Judge George Hart ruled that the government had not asked whether the statement was true or false and, therefore, had no case! So it was reported in 3 *WATERGATE AND THE WHITE HOUSE* 134 (FACTS ON FILE, Edward Knappman and Evan Drossman, eds., 1974). Perhaps, this is another "reiteration case?" See *infra* note 240.

36. 737 F.2d 564 (6th Cir. 1984).

37. After graduating from Viet Nam, I thought about applying to the Medical School at Ohio State. I could not get by the Medical School's formidable receptionist. She told me that I was too old to be considered a serious candidate. Looking back, my guess is that she was speaking in code — no one in my family was a physician. But I believed her, and I enrolled in law school. Needless to say, I find the *Eddy* case particularly amusing.

A: No, sir.

Q: And official college transcript?

A: No.<sup>38</sup>

Eddy's argument was that he was only trying to join the Navy — not necessarily as a Navy doctor! Moreover, since the diploma and the transcript were phony, his answers were true and not false. The diploma was not an Ohio State University diploma (not an *authentic* one), but instead was a phony. The transcript was *not* "official." It was fake, too. Both were "novelty items not meant to be taken seriously."

The Sixth Circuit sided with Eddy! "Eddy's negative responses to the prosecutor's questions were the literal truth 'in light of the meaning that he, not his interrogator, attributed to the questions and answers' . . . and therefore could not support a perjury conviction."<sup>39</sup> Slippery Witness — 1; Prosecutor — 0.<sup>40</sup>

It is often opined that "many questions may lend themselves to various interpretations 'when subjected to ingenious scrutiny after the fact' . . . but the words used are 'to be understood in their common sense,' not as they might be warped by sophistry or twisted in pilpul. . . . Imaginative hindsight will not save a defendant who has testified falsely."<sup>41</sup> But the courts also say that the jury is entitled to help from the prosecutor. "[T]he 'true' paragraph [of the charge] must 'track' the false testimony";<sup>42</sup> and the prosecutor's questions must be precise. Indeed, since the "intent" element of the crime requires that the witness believe that the testimony he gives is false, the jury has to determine what the *witness* understood the question to mean. The jury will be charged to make this determination applying an *objective* standard (if the standard were purely subjective, it would be virtually impossible to obtain a conviction), but some courts have gone so far as to recognize a defense grounded on the notion that a line of

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38. *Eddy*, 737 F.2d at 565.

39. *Id.* at 569. Compare the case of the perjurious dentist in Underwood, *Anthology*, *supra* note 8, at 367-699 (dentist altered medical record to slip out of the malpractice noose, and testified at the malpractice trial that the altered record was the original — his later defense to a perjury charge was that by "original," he meant only that it was not a photocopy of the altered document — it was the original of the altered version).

40. To add insult to injury, the court in *Eddy* gave as an additional reason for reversal of Eddy's conviction, the "realistic likelihood of vindictiveness" in the institution of the perjury charges, since they followed his acquittal on initial criminal charges. *Eddy*, 737 F.2d at 571-72. But see *infra* notes 177, 185 and accompanying text.

41. *Martellano*, 675 F.2d at 942.

42. *United States v. Finucan*, 708 F.2d 838, 847 (1st Cir. 1983).

questioning was so "fundamentally ambiguous" as to make the answers insufficient to support a perjury conviction as a matter of law.<sup>43</sup>

Section 1623 lightens the prosecutor's burden of proof by defining the crime as knowingly making two or more declarations which are inconsistent to the degree that one of them is necessarily false. The prosecutor need not specify which of the two is false, although the allegedly irreconcilable statements have to be set out in the indictment. In *United States v. Crisconi*,<sup>44</sup> the court held that an indictment is subject to dismissal on motion if the allegedly inconsistent declarations are not irreconcilable.<sup>45</sup>

### CRIMINAL INTENT

Be thou a spirit of health or goblin damn'd,  
Bring with thee airs from heaven or blasts from hell,  
Be thy intents wicked or charitable,  
Thou comest in such a questionable shape . . .

William Shakespeare, *Hamlet*,  
Act I, sc. iv, lines 40-43

Under section 1621, the old perjury statute, the government must prove not only "knowledge"<sup>46</sup> of falsity, but also that the falsehood was "willfully" stated. Falsehood resulting from mistake, confusion, or misunderstanding, is not perjury.<sup>47</sup> Willingness to correct a misstatement may negate "willful intent," although willingness to correct is not a defense as such.<sup>48</sup> Under section 1623, the government must prove that the false testimony was given or the false statement was subscribed knowingly. There is no additional

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43. See discussion in *United States v. Lighte*, 782 F.2d 367, 375 (2d Cir. 1986). See also *Weissman*, (unpublished disposition) 1996 WL 742844 at \*18.

44. 520 F. Supp. 915, 919 (D. Del. 1981).

45. *Crisconi*, 520 F. Supp. at 919-20.

46. The statute does not expressly state that knowledge must be proved. Instead, the requirement is that the witness not believe the testimony to be true. So the "knowledge requirement" is, in a sense, an interpretation of the statutory language. See *Stassi v. United States*, 401 F.2d 259, 262 (5th Cir. 1968). This requirement of "knowledge" does not appear to be important in cases in which it is alleged that the defendant lied about his or her recollection. See *infra* notes 88, 209-218, 271, 277-78 for discussion of additional cases.

47. *United States v. Dunnigan*, 507 U.S. 87, 93 (1993).

48. *Beckanstin v. United States*, 232 F.2d 1, 4 (5th Cir. 1956).

requirement of willfulness.<sup>49</sup>

It is sometimes said that if a witness makes an unqualified statement of something that he or she does not know to be true, that this is perjury.<sup>50</sup> However, this rule may have to be applied in light of other statutory requirements, such as the requirement of willfulness and materiality.<sup>51</sup>

It is also generally stated that the witness need not know that a statement is material,<sup>52</sup> and that a mistake as to materiality is no defense.<sup>53</sup> This brings us to the subject of materiality.

### MATERIALITY

Hamilton Burger, D.A.: Incompetent, irrelevant, and immaterial!

Erle Stanley Gardner, *Perry Mason*<sup>54</sup>

The very cattle in the fields scoffed<sup>55</sup> when the infamous Detective Mark Fuhrman was asked by F. Lee Bailey if he was denying that he had used the "N-word" in "speaking about" black people in the past 10 years, *and the feckless Fuhrman affirmed under oath that that was "what he was saying."* Later, when he was charged with perjury, his lawyer reportedly urged him to fight the charge. Some suggested that if his testimony had been a lie, it

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49. See, e.g., *United States v. Fornaro*, 894 F.2d 508 (2d Cir. 1990); *United States v. Goguen*, 723 F.2d 1012 (1st Cir. 1983). For a recent unpublished opinion, see *United States v. Catalano*, (unpublished disposition) 1994 WL 637748 (S.D.N.Y., Nov. 10, 1994).

50. See also CAL. PENAL CODE § 125 ("Statement of That Which One Does Not Know to Be True"): "An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false." *Id.*

51. See *People v. Agnew*, 176 P.2d 724 (Cal. Dist. Ct. App. 1947). See also *infra* notes 86, 121, 209-18 and 156-57 for cases on false statements regarding one's state of mind or memory.

52. See, e.g., *United States v. Catalano*, (unpublished disposition) 1994 WL 637748, (S.D.N.Y., Nov. 10, 1994).

53. See, e.g., KY. REV. STAT. ANN. § 523.020 (Banks-Baldwin 1994 & 1997 Cum. Supp.). The Commentary to this section seems to indicate that the witness is required to answer all questions, and answer them truthfully. See ROBERT LAWSON & WILLIAM FORTUNE, KENTUCKY CRIMINAL LAW, § 14.65 (1998).

54. A general objection, ineffective in most states and ineffective in the federal courts. See generally STEVEN GOODE AND OLIN GUY WELLBORN III, COURTROOM EVIDENCE HANDBOOK 51 (2d ed. 1997). Such an objection may suffice in Kentucky! See RICHARD UNDERWOOD & GLEN WEISSENBERGER, KENTUCKY EVIDENCE COURTROOM MANUAL 8 (1997).

55. I note, in passing, that the fact that the questioner already knows the answer to the question is irrelevant as to whether the answer given was material. *United States v. Kross*, 14 F.3d 751 (2d Cir. 1994) (perjury in a deposition).

had not been "material."<sup>56</sup> That had been the position of the Los Angeles District Attorney, Gil Garcetti. This was a bit much for the pundits, who were quick to respond that the credibility of a witness is ordinarily thought to be material.<sup>57</sup> Later, Fuhrman also

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56. See generally Alan Abrahamson and Jim Newton, *Fuhrman May Enter Plea in Perjury Case*, L.A. TIMES, Oct. 2, 1996, at A1. When Fuhrman's trial judge accepted his "No Contest" plea, he suggested that a charge of perjury might be hard to prove, because the law requires that the lie be related to a "material" matter. See Michelle Caruso, *Fuhrman Pleads No Contest To Lying*, [N.Y.] DAILY NEWS, Oct. 3, 1996, at 8. See also Jim Newton and Stephanie Simon, *Both Sides Gain Advantages by Cutting a Deal*, L.A. TIMES, Oct. 3, 1996, at 1A.

Question: If his only statement had been how he had *addressed someone*, then would proof that he used the vile word in conversations with a professor/film-maker establish a case of perjury, or would he be able to get by with a "literal truth" defense? Cross-examiner Bailey asked if Fuhrman has used the word in addressing people and in dealing with African Americans — but he also asked questions about how Fuhrman had "*spoken about black people*" and whether Fuhrman had *used* the word." In other words, he touched the critical bases. See GERALD F. UELMEN, *THE O.J. FILES: EVIDENTIARY ISSUES IN A TACTICAL CONTEXT* 163 (1997). In any event, Fuhrman entered a plea of "no contest" and took a \$200 dollar fine and three years probation on the chin. See *Fuhrman Gets Probation for Lying in Simpson Trial*, COURIER-JOURNAL [LOUISVILLE, KY.], Oct. 3, 1996, at 1. The California Attorney General immediately claimed that he had landed a *knock-out blow*, using the rhetorical hyperbole characteristic of professional politicians.

57. This *mantra* is often recited, but what does it really mean? Dean Uelmen cites BERNARD JEFFERSON, *SYNOPSIS OF CALIFORNIA EVIDENCE LAW*, section 2.19, at 277 (1985) for the proposition that evidence of a witness' credibility is always relevant and is never *collateral*. UELMEN, *supra* note 56, at 150. This is surely an overstatement. Compare the following statements that have been made by courts regarding witness credibility and materiality for purposes of the perjury statutes. See, e.g., *People v. Collins*, 92 P. 513 (Cal. Dist. Ct. App. 1907) ("False testimony, circumstantially material, or supporting or giving credit to a witness, or *discrediting him with respect to the main facts in issue*, is perjury.") See also *United States v. Burke*, (unpublished disposition) 1986 WL 14092 (D. Mass., Nov. 26, 1986):

Although the cases have stated broadly that any false statement affecting the credibility of a witness will generally constitute perjury, *that rule cannot be used to eliminate the materiality requirement of the statute*. In all the cases cited by the parties, statements which were found material on the issue of credibility were statements which were *in some way related to the ultimate issue being decided by the court*. . . . [D]efendant's allegedly perjurious statement reflects on his credibility at most only in a general way. The statement had nothing to do with the facts which were central to the proceeding . . . nor did it reflect on defendant's ability to observe the events to which he testified.

*Id.* (emphasis added).

For a collection of the federal cases, see Saad, *supra* note 24, at 872, n.78. So are matters relating to credibility always material for purposes of the federal perjury statutes? Maybe not always. For further discussion, see *United States v. Kross*, 14 F.3d 751 (2d Cir. 1994). In *United States v. Adams*, 870 F.2d 1140, 1147-48 (6th Cir. 1989), the court opined that while "the credibility of a witness is always at issue, . . . not every word of a witness' testimony is invariably material. *The materiality of a particular snippet of testimony is not automatically established by the simple expedient of proving that the testimony was given.*" *Id.* (emphasis added). But see *Commonwealth v. Thurman*, 691 S.W.2d 213 (Ky. 1985) (defendant's statements attacking the victim's credibility were material because they had the potential to influence the jury). See also UELMEN, *supra* note 56, at 167.

took "the Fifth" when he was asked by (Law School Dean) Gerald Uelmen whether he had committed perjury and planted evidence in (gasp) — *in the very case!*<sup>58</sup> Some experts opined that Fuhrman had to plead "The Fifth" to these questions to avoid waiving the privilege generally,<sup>59</sup> but the "O.J. Case" was over and the "Fuhrman Case" had just begun.<sup>60</sup> Many viewers (even some lawyers) were shocked by the law or logic (or both) that kept the "O.J. Jurors" from hearing that Detective Fuhrman had "taken the Fifth" when asked the question, "Did you plant or manufacture any evidence *in this case?*"<sup>61</sup>

Insofar as grand jury testimony is concerned, it is generally held that materiality will be "broadly construed," since the grand jury's function is investigative.<sup>62</sup> The test of materiality in this context is "whether the false testimony has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation."<sup>63</sup> It has been held that the jury is not required to make additional findings that the investigation is legitimate,<sup>64</sup>

58. Richard Seven, *The Rebuttal; Former Los Angeles Detective Mark Fuhrman Lashes Out Against Those Who Call Him a Perjurer and a Racist*, SUN-SENTINEL [FORT LAUDERDALE, FL.], MAR. 13, 1997, at 1E; PAUL PRINGLE, *Fuhrman Refuses to Answer Questions at Simpson Trial*, DALLAS MORNING NEWS, Sept. 7, 1995, at 1A; David Margolick, *Simpson Detective, Back in Court, Refuses to Reply on Role in Case*, N.Y. TIMES, Sept. 7, 1995, at A1. For the Q&A, see UELMEN, *supra* note 56, at 204.

59. Pringle, *supra* note 58, at 1A.

60. When Fuhrman received a \$200 fine after pleading "no contest," the media outrage was hardly surprising. One writer of a letter to the editor noted that her "terrified 78-year old uncle" had just received 160 days community service, a \$978 fine, and three years' probation, on a shoplifting charge. How could an admitted (more or less) perjurer in a capital murder case, and a representative of "law and order" to boot, get only a \$200 fine? See Julie Ann Hoffman, *Mark Fuhrman*, L.A. TIMES, Oct. 7, 1996, at B4. See also Editorial, *Fuhrman Plea-Bargain an Outrage That Taints Criminal Justice System*, SUN-SENTINEL [FORT LAUDERDALE, FL.], Oct. 4, 1996, at 14A.

61. Fuhrman was not the defendant (not technically!). For some academic criticism of the ruling and California law on the subject, see Charles R. Nesson & Michael J. Leotta, *The Fifth Amendment Privilege Against Cross-Examination*, 85 GEO. L. J. 1627, 1653 (1997). See also New York v. Priester, 470 N.Y.S.2d 478, 479 (N.Y. Sup. Ct. 1983) (suggesting that if the prosecutor wants to use (rely upon?) testimony of a witness who pleads the Fifth out of a claimed fear of a perjury prosecution for earlier testimony, the use of the earlier testimony can be conditioned on a grant of immunity so that the witness can be cross-examined). Dean Uelmen points out the irony of the prosecution being permitted to rely upon Fuhrman's testimony in the case while opposing a grant of use immunity. See UELMEN, *supra* note 56, at 215.

62. United States v. Gribben, 984 F.2d 47, 51 (2d Cir. 1993).

63. Carroll v. United States, 16 F.2d 951, 953 (2d Cir. 1927). See cases collected by Saad, *supra* note 24, at 870-874. See also the recent case of *United States v. Danton*, (unpublished disposition) 1996 WL 729848 (E.D. Pa., Dec. 11, 1996) ("tendency to influence, impede, or hamper the grand jury from pursuing its investigation").

64. Such a "contrived materiality" argument is really the "perjury trap argument under



although the defendant may attempt to advance an affirmative defense known as the "perjury trap."<sup>65</sup>

All of this may seem simple enough, but in some jurisdictions the concept of materiality remains a mystery in the application. A recent Kentucky case, on appeal to Kentucky's high court, proves the point. The case is of particular interest because it arose out of an investigation alleging fraud in connection with the operation of a prosecutor's office.<sup>66</sup> While this article was in an early draft, the prosecutor still awaited trial on charges of "conspiracy, obstruction of justice, perjury, and inducing someone else to commit perjury."<sup>67</sup> Meanwhile, the Kentucky Attorney General continued to investigate the operations of the prosecutor's office. A grand jury had been convened, and the prosecutor's detective and secretary were called as witnesses. She was indicted for theft for accepting state money for working for the prosecutor in his private practice. This charge was dismissed by the trial court on the theory that she was a part-time government employee, and that no published guidelines stated how many hours she had to devote to public work to earn her government salary. Both she and the detective were also charged with perjury for lying about the number of hours she worked for the prosecutor on government matters as opposed to his private practice.<sup>68</sup> The trial judge reasoned that they could not

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a different label." See *United States v. Regan*, 103 F.3d 1072, 1081 (2d Cir. 1997) ("perjury trap" is an affirmative defense that does not turn on factual innocence but rather on the existence of prosecutorial misconduct; the existence of a "perjury trap" is an issue for the court; and defendant may not shift the burden of proof to the government or make the "perjury trap" a jury issue "by advancing the same argument in the guise of [contrived] materiality"). For a similar, unsuccessful attempt to reargue the "perjury trap" under the rubric of materiality, see *United States v. Martino*, (unpublished disposition) 1988 WL 41468 (E.D. Pa., Apr. 28, 1988).

65. See *infra* notes 158-163 for a discussion of the "perjury trap."

66. The possibility of lawyers being prosecuted for crimes associated with lying, fraud, fraudulent billing, and the like, has become a hot topic. The possibility of mail fraud charges alluded to in the book and movie, *The Firm* were reflected in life in the sorry case of Webster Hubbell. Law journal articles are now appearing, dealing with the ethical and criminal law consequences of fraudulent billing and other lies told to clients. See, e.g., Lisa Lehrman, *Lying To Clients*, 138 U. Pa. L. Rev. 659 (1990).

67. See Mark Chellgren, *Supreme Court to Take up Question of Whether Lie to Grand Jury Is Perjury*, LEXINGTON [KY.] HERALD-LEADER, Aug. 30, 1997, at C3; Charles Wolfe, *Letcher County Prosecutor Pleads Innocent to Charges of Corruption*, COURIER-JOURNAL [LOUISVILLE, KY.], June 5, 1993, at 9A (prosecutor "allegedly paid as much as \$35,000 in state money to the secretary for his [private] law firm" — she was charged with theft by unlawful taking, and he was charged with complicity to theft). The prosecutor charged that the prosecutions were politically motivated and designed to derail his run for reelection. Fran Ellers, *Letcher's Prosecutor, Aide Indicted*, COURIER-JOURNAL [LOUISVILLE, KY.], May 21, 1993, at 1A.

68. LEXINGTON [KY.] HERALD-LEADER, Mar. 30, 1996, at B3.

have committed perjury, because it turned out that there was no underlying theft crime. The trial court reasoned that their testimony did not relate to a crime and, therefore, could not possibly have affected the outcome of the proceeding.<sup>69</sup> The court of appeals affirmed.<sup>70</sup> The Assistant Attorney General who has taken the case to the Supreme Court was understandably upset. The grand jury investigation seemed justified, and at the time the witnesses lied, no court had yet ruled that there was no crime.<sup>71</sup> If the witnesses lied under oath in an attempt to deceive the grand jury, wasn't that enough?<sup>72</sup> It would now appear that the Kentucky high court may not have to answer the question. The prosecutor pled guilty to suborning the perjury of a judge in an effort to cover up the prosecutor's malpractice in a wrongful death case. As part of the plea agreement, all charges against the secretary were dropped.<sup>73</sup>

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69. But didn't the possibility exist that the testimony could have dissuaded the grand jury from further investigations, perhaps relating to other charges against other people involved in the operation of the prosecutor's office? Compare *United States v. Vap*, 852 F.2d 1249 (10th Cir. 1988). At the time of the ruling, charges were still pending in federal court against the prosecutor.

Note that similar arguments over materiality — the time of testing the materiality of a statement — have surfaced in the "Paula Jones case." The question is whether President Clinton fibbed about his relationship with Monica Lewinsky in a deposition in the *Jones* lawsuit. When the trial judge decided to keep out all evidence regarding Lewinsky, some claimed that a perjury prosecution could no longer be pursued. See Editorial, *Material Statements*, WASH. POST, Feb. 1, 1998, at C8. Others disagreed on the theory that the lie related to a fact that was material at the time the deposition was given. The "Lewinsky affair" (no pun intended, of course) has [*T*]urned *Esoteric Terms* [such as perjury, subornation, obstruction, immunity, etc.] *Into Household Words*, according to Joan Biskupic, WASH. POST, Jan. 25, 1998, at A17. See also Lynn Sweet, *Ruling in Jones Case Backfires Against Starr*, CHI. SUN-TIMES, FEB. 1, 1998, at 7; GAYLORD SHAW, *Implications of the Law*, NEWSDAY, Jan. 23, 1998, at A28; Lyle Denniston, *Probe Raises Host of Legal Questions*, BALT. SUN, Jan. 25, 1998, at 6A.

70. *Appeals Court Backs Letcher Perjury Ruling*, COURIER-JOURNAL [LOUISVILLE, KY.], Mar. 30, 1996, at 12A.

71. Compare *United States v. Stone*, 429 F.2d 138 (2d Cir. 1970) (materiality tested as of the time the statement was made).

72. Compare *United States v. Manfredonia*, 414 F.2d 760 (2d Cir. 1969) (dismissal of case did not render perjury in case immaterial); *United States v. Cohn*, 452 F.2d 881 (2d Cir. 1971) (false grand jury testimony material even though it related to crimes that could not be prosecuted because the statute of limitations had run); *United States v. McInnis*, 601 F.2d 1319, 1327 (5th Cir. 1979) (grand jury had jurisdiction to investigate conduct that might have been a federal crime; "[a] grand jury might decide . . . that the actions were not criminal," but that would not defeat the prosecution for perjury); *United States v. Williams*, 552 F.2d 226 (8th Cir. 1977) (mere possibility that violation of federal law has occurred).

73. Allen Breed, *Guilty Plea Ends Case of Former Prosecutor*, LEXINGTON [KY.] HERALD-LEADER, Jan. 8, 1998, at B3. See also *United States v. Craft*, 105 F.3d 1123 (6th Cir. 1997) (dismissing federal charges against prosecutor in connection with the fabricating and backdating of documents filed in federal wrongful death action; indictment dismissed as barred by statute of limitations).

There is some disagreement over the standard of materiality to be applied to testimony given at a deposition where perjury may be prosecuted under section 1623. Federal Rule of Civil Procedure 26(b)(1) provides that questioners may seek information that is reasonably calculated to lead to the discovery of admissible evidence. Inasmuch as the questioning hounds might be "thrown off the scent" by perjury, although the answer to the deposition question might not in itself be admissible in evidence, some federal appellate courts have held that, for purposes of section 1623, materiality in a civil deposition is not limited to evidence admissible at trial.<sup>74</sup> Other courts have been more restrictive, requiring more than "discoverability" — the false statement must have had a tendency to affect the outcome of the underlying proceeding.<sup>75</sup>

Older opinions sometimes treat materiality as an issue of law for the court, but in federal courts, materiality is now treated as an issue that must be submitted to the jury, under instructions requiring proof of materiality beyond a reasonable doubt.<sup>76</sup> The state cases are falling into line, although the issue remains open in some jurisdictions.<sup>77</sup>

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74. *United States v. Kross*, 14 F.3d 751 (2d Cir. 1994) (citing cases from the Fifth Circuit). For a similar "broad" definition in a case involving perjury in a worker's compensation case, see *People v. Gillard*, 66 Cal. Rptr. 2d 790 (Cal. Ct. App. 1997) (that worker's compensation judge concluded that claimant did suffer a work-related injury did not collaterally estop the state; perjury was still material). See also *supra* note 69 for discussion of the "Lewinsky affair."

75. *Id.* (citing, among other cases, *United States v. Adams*, 870 F.2d 1140 (6th Cir. 1989)).

76. The courts rely on *United States v. Gaudin*, 515 U.S. 506 (1995) (prosecution under 18 U.S.C. section 1001; materiality a jury question). See Saad, *supra* note 24, collecting lower court cases accepting *Gaudin* as controlling in prosecutions pursuant to sections 1621 and 1623. See *United States v. Sassanelli*, 118 F.3d 495 (6th Cir. 1997); *United States v. Regan*, 103 F.3d 1072 (2d Cir. 1997); *United States v. Danton*, (unpublished disposition) 1996 WL 729848 (E.D. Pa., Dec. 11, 1996).

77. See Ky. Rev. Stat. Ann. § 523.010(1) (Banks-Baldwin 1994 & 1997 Cum. Supp.) ("Whether a falsification is material in a given factual situation is a question of law."). Is this statute constitutional?

## THE TWO-WITNESS RULE

One witness shall not rise up against a man  
for any iniquity, or for any sin, in any  
sin that he sinneth;

At the mouth of two witnesses, or at the  
mouth of three witnesses, shall the matter  
be established.

*Deuteronomy 19:15*

At common law, proof of perjury required the testimony of two witnesses.<sup>78</sup> The notion seems to have been that honest witnesses might be intimidated by the threat of “too-easy” prosecution.<sup>79</sup> The “two-witness” rule has been watered down, however. In cases brought under the “old” perjury statute, 18 U.S.C. section 1621, what actually is needed is one witness plus some independent corroboration (that is, the uncorroborated oath of one prosecution witness is still insufficient).<sup>80</sup> Most courts appear to subscribe to the view that circumstantial evidence will do for the corroboration.<sup>81</sup> As the Fourth Circuit has put it, the rule “is really nothing but a short-cut way of stating that, in a perjury trial, the evidence must consist of something more convincing than one man’s word against another’s.”<sup>82</sup> It also has been suggested that even this vestige of the “two-witness” rule — one witness plus corroboration — is not required if there is “real” evidence, as opposed to “oral” testimony.<sup>83</sup> Some “real” evidence may be “more

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78. Actually, the two-witness rule is ancient, and proof by two witnesses was once required in many types of cases. The Constitution provides that the crime of treason must be proved by the testimony of two persons who directly witnessed the same “overt act.” U.S. CONST. art. II, § 3.

79. PROVING FEDERAL CRIMES 158 (Criminal Division of the United States Attorney for the Southern District of New York, 1976) (citing *Weiler v. United States*, 323 U.S. 606, 609 (1945)).

80. *United States v. Weiner*, 479 F.2d 923 (2d Cir. 1973). See discussion in *United States v. Weissman*, (unpublished disposition) 1996 WL 742844 (S.D.N.Y., Dec. 20, 1996).

81. Mr. Nixon’s views on the subject were mistaken. See Underwood, *Anthology*, *supra* note 8, at 349-363.

82. *United States v. Beach*, 296 F.2d 153, 155 (4th Cir. 1961).

83. *United States v. Bergman*, 354 F.2d 931, 934 (2d Cir. 1966). Compare discussion in *United States v. Hogue*, 42 M.J. 533 (1995) (two-witness rule applies in false-swearing offense under Article 134 of the *Uniform Code of Military Justice* (“UCMJ”); but results of urinalysis, coupled with expert testimony, sufficient to prove that defendant knowingly used cocaine and, therefore, swore *falsely* to the contrary). See also *United States v. Wood*, 39 U.S. (14 Pet.) 430, 440-41 (1840) (“[T]his rule in its proper application, has been expanded beyond its literal terms as cases have occurred in which proofs have been offered equivalent

convincing than the testimony of an eyewitness and, unlike the testimony of one witness, is not susceptible to being misused to unduly harass or convict persons who testify in court or make statements under oath."<sup>84</sup>

I am not so sanguine about the purity of expert and scientific evidence.<sup>85</sup> But the quoted language does suggest a modern justification for what is left of the two-witness rule as a general rule<sup>86</sup> of "one witness plus corroboration."

The two-witness rule arose in England, during the seventeenth century. At that time, the common law courts assumed jurisdiction over perjury cases with the abolition of the Court of Star Chamber, which had followed the practice of the ecclesiastical courts of requiring two witnesses. . . . The theoretical justification for this approach was that in all other criminal cases, the accused could not testify, and thus one oath for the prosecution was in any case something as against nothing; but on a charge of perjury the accused's oath was always in effect in evidence and thus, if one witness was offered, there would be merely . . . an oath against an oath.<sup>87</sup>

While the original rationale did not reflect the needs of the modern jury trial, another reason justified its maintenance:

Since equally honest witnesses may well have differing recollections of the same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought

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to the end intended to be accomplished by the rule.").

84. *Hogue*, 42 M.J. at 537. See also *Weiler v. United States*, 323 U.S. 606, 608 (1945).

85. See Richard H. Underwood, "X-Spurt" Witnesses, 19 AM. J. TRIAL ADVOC. 343 (1995) ("X-Spurt" Witnesses").

86. There is an important exception for cases in which the allegedly perjurious statement relates to the defendant's state of mind. See *United States v. Nicolletti*, 310 F.2d 359 (7th Cir. 1962). In that case, the defendant, Nicolletti, testified that he did not recall being interviewed by two FBI agents on May 26, 1959. This was a false statement regarding his recollection. He remembered. See also *Gebhard v. United States*, 422 F.2d 281, 287 (9th Cir. 1970). But how can you produce two witnesses to a person's state of mind? You can't, and you don't have to. Proof of recollection cannot be proved by direct evidence, and must be proved by circumstantial evidence. See also the discussion of this issue in *United States v. Chaplin*, 25 F.3d 1373, 1377 (7th Cir. 1994). While a perjury prosecution will lie for a false statement of belief or state of mind — when the defendant has consciously misrepresented his or her state of mind, we are occasionally reminded that the state of mind must be material to the case. See, e.g., MODEL PENAL CODE, § 241.1 Commentary. See *People v. Phillips*, 205 P. 40 (Cal. Dist. Ct. App. 1922) (willful and false statement of belief that the witness knows does not exist may be prosecuted as perjury); *People v. Agnew*, 176 P.2d 724 (Cal. Dist. Ct. App. 1947).

87. *Chaplin*, 25 F.3d at 1377 (7th Cir. 1994).

not to rest entirely on an 'oath against an oath.' The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted.<sup>88</sup>

The "new" perjury statute, 18 U.S.C. section 1623, which applies to perjury in court proceedings and grand jury proceedings, dispenses with the "two-witness" rule entirely. The prosecutor need only establish that two declarations were made that were sufficiently inconsistent that one must have been false. The prosecutor need not prove which one is false. Arguments that the "two-witness" rule is fundamental and required by the Constitution have been rejected.<sup>89</sup>

## THE DEFENSES

### *Literal Truth*

He [Isaac] said, "Are you really my son Esau?"  
He [Jacob] answered, "*I am.*"

*Genesis 27:24*

And he [Isaac] said, "Are you my son Esau?"  
and he [Jacob] said, "*I am your son.*"

*Jubilees 26:19*

There *is* nothing new under the sun, after all! In *Genesis*, Jacob told a big lie "flat out," and to some early interpreters of the Biblical text, this was sufficiently scandalous to call for some "spin." In *Jubilees*, Jacob tells the "literal truth."<sup>90</sup> He was rehabilitated.<sup>91</sup>

It has already been noted that falsity is an element of the modern crime of perjury. Nevertheless, it is common for lawyers to allude to the defense of "literal truth." The argument that a statement may be misleading and intentionally so, but, nevertheless, literally true and, therefore, *not perjury* is sometimes called the "*Bronston*

88. *Id.* at 1378.

89. *United States v. Ruggiero*, 472 F.2d 599, 606 (2d Cir., 1973).

90. JAMES KUGEL, *THE BIBLE AS IT WAS*, 208-09 (1997).

91. After all, he was about to mold God's chosen into a nation state. We can't have George Washington-type figures telling lies. And wasn't it God's plan that Jacob would fool Isaac and triumph over Esau? A "flat out lie" just won't do.

Defense" — after the case of *Bronston v. United States*.<sup>92</sup> But the "lie" that is literally true has been the subject of philosophical debate since ancient times, long before Blake penned his lines. There is no need to digress further.<sup>93</sup> On to the facts of the case.

Samuel Bronston's company, Bronston Productions, went into bankruptcy. Mr. Bronston was called before the bankruptcy referee to testify about the company's assets. It was inevitable that a suspicious lawyer for one of the company's creditors, interested in Bronston's accounts, as well as those of the company, would ask the following questions. It was not inevitable that he would receive the following answers:

Q: Do *you have* any bank accounts in Swiss banks, Mr. Bronston?

A: No, sir.

Q: Have *you ever*?

A: [Dodging the question] The *Company* had an account there for about six months, in Zurich.

Q: Have you any nominees who have accounts in Swiss banks?

A: No, sir.

Q: Have you ever?

A: No, sir.<sup>94</sup>

While it was true that Mr. Bronston had no personal Swiss bank account at the time he gave his testimony, he had had one from 1959 through mid-1969. By shifting the subject to company accounts when responding to the second question, Mr. Bronston was able to trick the questioner into thinking that he had never had a personal Swiss bank account at times relevant to the proceedings. The answers to all the questions were literally true — a truth told with bad intent. Ultimately the history of Bronston's personal accounts was discovered (it usually is, sooner or later — from the introductory quotes, you can see that we have this on the very highest authority — so why do people play these games anyway?), and Bronston was charged with perjury and convicted. The conviction was affirmed by an appellate court, which found that his testimony consisted of "half-truths" that amounted to lies for purposes of 18 U.S.C. section 1621. But the Supreme Court

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92. 409 U.S. 352 (2d Cir. 1973).

93. I digress on this subject in *False Witness*, *supra* note 8, at 215 and in Richard H. Underwood, *Logic and the Common Law Trial*, 18 AM. J. TRIAL ADVOC. 151 (1994) ("Logic").

94. *Bronston*, 409 U.S. at 354.

reversed the conviction, opining that Bronston did not willfully state a material matter that the witness did not believe to be true — instead, the perjury prosecution was founded on what the listener implied or deduced from his answers. Bronston would not have succeeded in misleading the questioning attorney if the questioning attorney had asked more probing questions. Shame on the questioner. “The burden is on the questioner to pin the witness down to the specific object of the questioner’s inquiry.”<sup>95</sup> Bronston “got off,” but one wonders if he might have been better off being more forthcoming in the first place. But enough of this moralizing.

The “Bronston defense” is frequently asserted, and occasionally successful. In *United States v. Larranaga*,<sup>96</sup> a subpoena sought notes of company meetings that occurred in a given time frame. The defendant had his secretary type up informal notes that had been made on legal pads, napkins, and the like, and then produced the typed version as “minutes” of the company. When he was questioned before the grand jury, he was asked, “Question: Are these all of the minutes of the Board of Directors or any other subcommittees of the Board?” The witness answered in the affirmative. Later, the witness was convicted of perjury for deleting certain material from the typed version, and that conviction was affirmed. But the witness was also convicted on a second count of perjury on the theory that the original materials, the legal pads and napkins, were “minutes.” The grand jury could have taken his answer to mean that all relevant materials that existed had been turned over, when in fact, they had not been. Since the interrogator could have been more careful in his questioning, and since the witness’ answer was only false by “negative implication,” the conviction could not stand under *Bronston*.

*United States v. Reveron Martinez*<sup>97</sup> was another case in which the defendant was convicted on multiple counts of perjury with one count reversed on appeal under *Bronston*. The conviction on this count was grounded on the following exchange:

Q: Did you hear a second volley of shots?

A: After that, the shots stopped and there was not any more shots.<sup>98</sup>

The prosecutor’s argument was that the witness intended his

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95. *Id.* at 362.

96. 787 F.2d 489 (10th Cir. 1986).

97. 836 F.2d 684 (1st Cir. 1988).

98. *Reveron Martinez*, 836 F.2d at 690.



answer to be taken to mean that there was only one volley of shots, which was false. But his answer might also have meant that there was a second volley, but after that, "there was not any more shots."

In another case, *United States v. Earp, Childers, and Carrigan*,<sup>99</sup> defendant Carrigan was charged with lying to a grand jury in violation of 18 U.S.C. section 1623 when he gave the following testimony before a federal grand jury looking into the depredations of the Ku Klux Klan:

Q: How do you feel about burning crosses at the residences of interracial couples?

A: I don't believe in it.

Q: Have you ever done it, sir?

A: No, I haven't.<sup>100</sup>

The facts were that the defendants had tried to burn a cross, but hadn't been able to get the damned thing lit, and had been scared away when their victim opened his door to confront them. The prosecutor could have, and should have, asked about attempted cross burnings, but did not. Conviction reversed!

The defense of literal truth even crops up from time to time out in the sticks — in my own neck of the woods. In a recent case, a former National Guard Adjutant General, Robert DeZarn, was charged with lying under oath to Army investigators, denying that a 1991 Preakness Party was a fund-raiser (at which guard officers allegedly passed on campaign contributions in exchange for promotions — allegedly, noncontributors were sacked).<sup>101</sup> While the Army's hunt bagged no birds, the shooters from the United States Attorney's office stayed out in the fields. After all, the trail might lead to even bigger game — the alleged campaign contributions were to benefit a (former) Governor. DeZarn was indicted (as usual a co-defendant flipped), and the evidence offered at trial by the prosecutor tended to show that there had been such a party, but in 1990, not 1991.<sup>102</sup> In other words, DeZarn's denial had been the "literal truth." As a lawyer, I naturally resent having to fall back on a defense "on the merits," and so I was sufficiently intrigued by the

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99. 812 F.2d 917 (4th Cir. 1987).

100. *Earp*, 812 F.2d at 918.

101. See Tom Loftus, *Secret Tapes Put Wellman in Hot Seat*, COURIER-JOURNAL [LOUISVILLE, KY.], Sept. 26, 1996, at 1.

102. *Id.* See also Jack Brammer, *Lawyer Says Date Botches Guard Inquiry*, LEXINGTON [KY.] HERALD-LEADER, Sept. 27, 1996, at B1.

possibilities raised by the defense lawyer's "*Bronston* defense" that I did some legal research to see if he actually had something. I found *United States v. Chaplin*,<sup>103</sup> a decision from the Seventh Circuit that seems to be on point. Count Two of the indictment charged Mr. Chaplin with perjury when he gave the following answer to the following question:

Q: Mr. Chaplin, did you give Joseph Voss \$8,000 in currency on October 23, 1990?

A: I don't recall doing that, no.<sup>104</sup>

The "no" tacked on to the end of the "I don't recall doing that" was taken to be a categorical denial,<sup>105</sup> and was taken to be perjurious. The defendant was convicted, but the conviction (on Count Two, at least) was reversed. In addition to concluding that the government had not provided sufficient evidence of an October 23 transaction under the two-witness rule, here is what the Seventh Circuit said about "literal truth":

The indictment charged Mr. Chaplin with committing perjury when he denied giving Voss \$8,000 on October 23, 1990. If, for example, Mr. Chapman gave Voss \$8,000 on October 22, 1990, then his statement would be literally true, although perhaps misleading. The literal truth of the statement would be a complete defense to perjury. See *Bronston v. United States*, 409 U.S. 352, 360 (1973) (stating that section 1621 is not to be invoked 'simply because a wily witness succeeds in derailing the questioner — so long as the witness speaks the literal truth.').<sup>106</sup>

Unfortunately for DeZarn, Seventh Circuit cases don't count for much with trial court judges in the Sixth Circuit. There is a distressing lack of full faith and credit in other judges' opinions these days. "Gentlemen, that may be the law in [Chicago], but it [is]

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103. 25 F.3d 1373 (7th Cir. 1994).

104. *Chaplin*, 25 F.3d at 1375.

105. Compare *United States v. Sanborn*, (unpublished disposition) 1991 WL 21982 (6th Cir., Feb. 20, 1991) (prosecution under 18 U.S.C. section 1623):

Q: Have you ever worked at a nightclub downtown called Chassy's even for one day?

A: I knew the owners down there. I was introduced to them and I spent some time down there, *but never as an employee*.

*Id.* at \*3 (emphasis added). Had the defendant not tacked on the italicized language, his answers would have been nonresponsive, but literally true, and he might have relied on *Bronston*.

106. *Chaplin*, 25 F.3d at 1380.

not the law in Coosawhatchie."<sup>107</sup> DeZarn was convicted, and the case is now on appeal. As I have gotten older, I have learned not to expect too much, especially not consistency in the application of the law.<sup>108</sup> In any event, one suspects that the jury did not believe DeZarn's testimony at trial, and punished him accordingly. He explained that the investigators asked about a 1991 party (the investigators admitted this, and the indictment so stated), explained that there had been two parties in 1991 that were not fund-raisers (other witnesses agreed), and that he had, therefore, not been thinking about the 1990 party. This last statement seems to have enabled the prosecutor to slip into the record a newspaper article in which DeZarn told a reporter that the 1990 party also had not been a fund-raiser.<sup>109</sup> This made DeZarn look very slippery indeed. The prosecutor's theory seems to have been that when the investigators asked about 1991, they meant 1990, and that DeZarn knew, or should have known, that — or that if he had been asked about a 1990 party, he would have lied anyway, so what the hey! On the other hand, he was not being tried for lying to the news reporter, he did not say under oath that the 1990 party was not a fund-raiser (and was not indicted for that), and he was not being tried for lying at the perjury trial.<sup>110</sup> But the prosecutor's argument carried the day. Apparently the view of the trial judge was that

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107. Williams, *The Criminal Lawyer in Antebellum South Carolina*, 56 S.C. HIST. MAG. 138, 145 (1955). In the original quote, the reference was to Philadelphia, not Chicago.

108. The *DeZarn* case might have political fallout, and the news accounts allude darkly to the possibility that "others" may have engaged in improper damage control. A reversal could bring some comfort to "others."

109. My information comes from Jack Brammer, *Ex-Guard Chief Guilty of Perjury*, LEXINGTON [KY.] HERALD-LEADER, Sept. 8, 1996, at A1, A7). It reports that the statements were made to the *Courier-Journal* [Louisville, Ky.] in 1992. Was the article relevant to whether DeZarn lied to the investigators under oath, or relevant to whether he was lying at trial? Assuming that it was relevant, was its introduction more prejudicial than probative? Compare FED. R. EVID. 403. According to the *Herald-Leader*, the prosecutor argued that the article showed that DeZarn's trial testimony was a "bald-faced lie." But again, he was not charged with or on trial for perjury at the trial, although the jury may not have appreciated such fine distinctions. Of course, I am relying on news accounts, and my analysis may be flawed. Still, this is an interesting case!

110. Compare *Chaplin*, 25 F.3d at 1380:

The government suggests that the date of the alleged transaction is not material because, at his perjury trial, Mr. Chaplin denied he ever having given Voss \$8,000. We disagree. The question in this appeal is not whether Mr. Chaplin denied he ever lied during his perjury trial [or worse — lied to a reporter?], but rather, whether he lied in his bankruptcy depositions. To establish that he did lie, the government needed proof that his answers in that bankruptcy proceeding were literally false, which necessarily includes proving that the transaction occurred on October 23, 1990.

*Id.* Legal technicality? Of course! So what!

there was an "unambiguous understanding" by all, including DeZarn, that by "1991," the Army investigators meant "1990," and that in the absence of "unquestionable proof" that there was a "1991 Preakness Party having the same characteristics as the 1990 Preakness Party, the defense must fail."<sup>111</sup> This exercise in burden-shifting is a bit worrying to me. If the burden of proving falsity is on the prosecution, why does the defense have to prove anything about Preakness Parties in 1991?<sup>112</sup>

Obviously, the "adversary excuse" underpinning *Bronston* — that it's up to the other side to ferret out the truth — can be a hard sell,<sup>113</sup> and it has its professional critics, too. A most interesting case was brought to my attention by Professor Stephen Gillers of New York University's Law School.<sup>114</sup> The case is *Southern Trenching, Inc. v. Diago*,<sup>115</sup> a decision of an intermediate appellate court in Florida. The plaintiff recovered a \$1,087,000 judgement for personal injuries. Thereafter, the defendant discovered that the plaintiff had been injured in an automobile accident only three weeks before the trial, and had suffered the "same injuries" that had been attributed to the defendant's negligence. The trial court denied a motion for a new trial based on fraud and newly discovered evidence. According to the appellate court, the plaintiff had deliberately concealed the intervening accident — "with the knowledge and connivance of counsel." The appellate court reversed, granted the defendant a new trial, and referred the matter of counsel's conduct to disciplinary authorities.<sup>116</sup> The court was

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111. See *United States v. DeZarn*, Memorandum and Order (denying motion to dismiss), Cr. No. 96-5 (Apr. 2, 1996). For the proposition that a question must be evaluated in the context in which it is advanced, see *United States v. Danton*, (unpublished disposition) 1996 WL 729848 (E.D. Pa., Dec. 11, 1996).

112. The trial judge may have felt that the defense of "literal truth" is available only in cases in which the testimony under scrutiny consists of a nonresponsive answer (as in *Bronston*). That is an unnecessarily grudging view of the scope of the defense. The judge may also have viewed this as a case in which the testimony was not only responsive, but false "in context." There are cases like *United States v. Lighte*, 782 F.2d 367, 372-73 (2d Cir. 1986), that remind us that it is not the defendant's claimed subjective understanding that controls nor will statements necessarily be viewed in isolation. See *United States v. Schafrick*, 871 F.2d 300 (2d Cir. 1989) (The trial judge cited *United States v. Robbins*, 997 F.2d 390 (8th Cir. 1993) with particular reverence.).

113. I discussed the layman's instinctive response in *Underwood*, *Logic*, *supra* note 93, at 195, where I alluded to the Aesop fable of *The Two Boys and the Butcher*. See THE MEDICI AESOP (Adele Westbrook, ed. & Bernard McTigue, trans., 1989).

114. STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 413 (4th ed. 1995).

115. 600 So. 2d 1166 (Fla. Dist. Ct. App. 1992).

116. *Southern Trenching*, 600 So. 2d at 1166-67. The court indicated that it did not

perplexed and irritated by the attitude of the trial judge. The trial judge actually saw fit to *praise* the plaintiff's disingenuousness:

Plaintiff was examined by two defense experts (a medical expert, Dr. Pratt, and a Vocational Rehabilitation expert, Dr. Deutsch) after the April accident because, in his own words, "They never asked me! I was told not to volunteer." Would that all witnesses would be so direct! (There was no testimony from either expert concerning direct questions about accidents either before or after November 27, 1987). Since he wasn't asked specific questions about any other accidents or injuries, he didn't volunteer.<sup>117</sup>

Fortunately there are limits to *Bronston*, and some witnesses are too clever for their own good. They may be *so evasive*, and *so clever*, that their answers appear to be *completely responsive*.<sup>118</sup> A court may conclude that there was nothing to put the questioner on notice that there was any need for further questions, in that way shifting what would otherwise be the questioner's burden onto the subject of the investigation.<sup>119</sup> Evasion by resort to answers that are too artfully qualified,<sup>120</sup> or that are based on false claims of "I don't remember,"<sup>121</sup> may also discourage further inquiry by even the most

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expect the Florida Bar to do anything about it. "[P]ast experience tells us that . . . [calling counsel's impropriety to the attention of the Florida Bar] . . . is likely an exercise in futility." *Id.* at 1167 n.2.

117. *Id.* at 1167 n. 3.

118. This appears to have been the trial judge's view of the *DeZarn* scenario. The judge cited *United States v. Robbins*, 997 F.2d 390 (8th Cir. 1993). Eighth Circuit cases that favor the prosecution count with trial judges in the Sixth Circuit. *Robbins* does not seem nearly so close on the facts as *Chaplin*. *Robbins* was prosecuted for making a false oath in a bankruptcy proceeding. He had been asked, under oath, about his interest in a corporation called "11th and McArthur" when the actual name of the company was "McArthur and 11th Properties." The defendant may have even referred to the corporation earlier as "11th and McArthur." The court reasoned that the jury could have believed beyond a reasonable doubt that the defendant misled the investigator with a false name and then tried to capitalize on this by giving literally true answers, or made an inadvertent mistake in the corporate name, but knew full well what the prosecutor was driving at. *Robbins*, 997 F.2d at 394.

119. See, e.g., *United States v. Schaflick*, 871 F.2d 300 (2d Cir. 1989) (perjury conviction cannot be based on a particular interpretation that the questioner places upon an answer, but material untruth *in context* may establish perjury over a claim of literal truth *in isolation*).

120. *United States v. Sprecher*, 783 F. Supp. 133 (S.D.N.Y. 1992) (lawyer defendant). See also *United States v. Abrams*, 947 F.2d 1241 (5th Cir. 1991) (prosecution under 18 U.S.C. section 1623; "literal truth" defense available in theory, but answer that is responsive and false on its face cannot be justified because defendant can postulate unstated premises of question that might make his answer literally true).

121. *United States v. Biaggi*, 675 F. Supp. 790 (S.D.N.Y. 1987). See also *United States v. Rymer*, 961 F.2d 1580 (6th Cir. 1992) (prosecution under 18 U.S.C. section 1623; charge based

dogged inquisitor, but later, when the truth is out, invite a prosecution for perjury. The "*Bronston* defense" has not had much of a track record in this context.<sup>122</sup>

### *Recantation*

Touchstone: Let us make an honorable retreat;  
though not with bag and baggage,  
yet with scrip and scrippage.

William Shakespeare, *As You Like It*,  
Act III, sc. ii, lines 169-71

In the fall of 1991, Senator Arlen Specter made the following charge:

Judge Thomas, I went through that in some detail, because it is my legal judgment, having had some experience in perjury prosecutions, that the testimony of Professor Hill in the morning was flat out perjury and that she specifically changed it in the afternoon when confronted with the possibility of being contradicted. And if you recant during the course of the proceeding, it's not perjury.<sup>123</sup>

The statute, section 1623(d), provides:

Where, *in the same continuous* court or grand jury proceeding in which a declaration is made, the person making the declaration *admits* such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration *has not substantially affected the proceeding, or it has not become manifest* that such falsity *has or will be exposed*.<sup>124</sup>

I have noted elsewhere that this particular perjury expert was

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on repeated false statements to the grand jury that he could not remember statements he made to agents; *Bronston* defense inapplicable). On a related issue, see *United States v. Weissman*, (unpublished disposition) 1996 WL 742844 (S.D.N.Y., Dec. 20, 1996) (a conviction may not rest on a defendant's response to a question concerning why another person acted in a certain manner, as the question would improperly force the defendant to "speculate as to [another's] motives" . . . but "a witness is entirely competent to testify to his own beliefs, even when those beliefs concern another's intentions, and can, conceivably, do so dishonestly.").

122. For tales from some notable cases, see Underwood, *Anthology*, *supra* note 8.

123. TIMOTHY PHELPS & HELEN WINTERITZ, *CAPITOL GAMES: CLARENCE THOMAS, ANITA HILL, AND THE STORY OF A SUPREME COURT NOMINATION* 344-45 (1992).

124. 18 U.S.C. § 1623(d) (emphasis added).

wrong on two counts.<sup>125</sup> As I discussed above, 18 U.S.C. section 1623 allows the prosecutor to construct a *prima facie* case on the inconsistency between two statements, but that statute does not apply to Congressional hearings. What is more important, for present purposes, is the fact that *timely* recantation may save a witness under 18 U.S.C. section 1623, but it will not necessarily save a witness under the old general perjury statute, 18 U.S.C. section 1621. That is, recantation is not a defense under the old "willful perjury" statute, although it may serve to negate the necessary criminal intent.<sup>126</sup> The weight of authority holds that the prosecutor may pick the weapon of his or her choice and charge the defendant under the old "general" statute to dodge the "recantation defense."<sup>127</sup>

It has been suggested that allowing the government to fall back to a section 1621 prosecution "leads to the anomalous [sic] result that a properly executed recantation under section 1623 will likely provide all of the evidence necessary to ensure a successful prosecution under the former statute" — a sort of "recantation trap."<sup>128</sup> Perhaps there is something to this. The reader might reflect on the facts of *United States v. McAfee*.<sup>129</sup> In this case, the defendant was convicted of one count of willful perjury under

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125. See Underwood, *False Witness*, *supra* note 8, at 248. I would say, in his defense, that if the witness had been an assistant secretary in the bologna sandwich department, Congresspersons or Senators of the opposing party would have called for his or her immediate prosecution for perjury. In other words, whether or not there will be a prosecution probably has more to do with the politics of the situation than the seriousness of the perceived offense.

126. See *United States v. McAfee*, 8 F.3d 1010 (5th Cir. 1993); *Beckanstin v. United States*, 232 F.2d 1 (5th Cir. 1956) (issue of intent resolved in favor of the defendant as a matter of law).

127. See Thomas Campion & Kathryn Hamilton, *A Review of Perjury*, 6 LRRG. 22 (1980); Saad, *supra* note 24, at 859-60. Among the leading cases are *United States v. Ruggiero*, 472 F.2d 599 (2d Cir. 1973) and *United States v. Kahn*, 472 F.2d 272 (2d Cir. 1973) (expressing reservation in *dicta*).

128. Saad, *supra* note 24, at 876. Compare the dilemma of the defendant if he or she is the subject of parallel civil proceedings. The defendant may have already testified voluntarily or under a grant of immunity before a grand jury. The defendant may then face the risk of a perjury prosecution if his or her testimony in a deposition is inconsistent with the prior testimony. See *Instituto Nacional v. Continental Ill. Nat'l Bank*, 530 F. Supp. 276 (N.D. Ill. 1981) (A deponent was allowed to assert Fifth Amendment privilege! Could Monica Lewinsky have done this?). See also *United States v. Sassanelli*, 118 F.3d 495 (6th Cir. 1997) (defendant convicted of criminal offenses arising from his participation in a scheme to defraud others was also convicted of perjury for statements he made in an affidavit submitted in a civil case in which he had denied involvement in the scheme). See generally Harvey Silets, *Representing the Subject or Potential Subject of a Criminal Investigation in a Civil Suit*, 137 PLL/CRIM. 47 (1985).

129. 8 F.3d 1010 (5th Cir. 1993).

section 1621 and three counts of making irreconcilable contradictory declarations under section 1623. McAfee, a cattle hide processor, had been sued in two separate civil actions for his alleged role in a stolen hides scheme. McAfee was separately deposed in each of these cases, although they were consolidated and ultimately settled. However, perceived perjury was referred to the United States Attorney by one of the plaintiff's attorneys. Section 1623(c) applies to depositions in civil cases. The three counts against McAfee under section 1623 arose from inconsistencies between his two separate depositions. As a defense to one of the section 1623 counts, McAfee argued that he recanted testimony given in his earlier deposition on the first day of his second deposition. This defense failed because the court ruled that the second deposition was not part of the same proceeding in which the false statement was made — the recantation was not sufficient under section 1623 to provide a defense to the section 1623 counts. Count 1 charged a violation of section 1621 on the ground that the testimony in the first deposition was perjured. The attempted (and in this case, legally ineffective) recantation, must have helped prove the prosecutor's point.

The *McAfee* case provides some support for the view that section 1623(d) provides "one of the best 'traps for the unwary' yet devised by Congress to insure the conviction of perjurers[:]"<sup>130</sup> (1) There must be an admission that one of the declarations is false; then, (2) the retraction must be made before the proceeding has been substantially affected; *and*<sup>131</sup> (3) before it has become manifest that the falsity of the testimony has been, or will be, exposed. The courts have not interpreted any of these conditions in a way that is the least bit "defense favorable." A virtually immediate retraction might do,<sup>132</sup> but anything else probably will not do. Neslund claims that "to date no reported decision reveals a defendant who has successfully avoided a section 1623 conviction by using the recantation provision."<sup>133</sup> My dips into the annotations in West's 18

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130. Neslund, *supra* note 18, at 10-24.

131. See *infra* note 137 and accompanying text.

132. How often will this happen, even if the witness is acting in good faith? Compare Beckanstin v. United States, 232 F.2d 1 (5th Cir. 1956), discussed at *supra* note 126 and accompanying text.

133. Neslund, *supra* note 18, at 10-25. But compare Kristy Kennedy, 'The Case Is Starting to Fall Apart,' *Defence Lawyers Claim Victory After Judge Tosses Out Perjury Charge for Cruz Defendant*, CHI. DAILY HERALD, Jan. 22, 1998, at 1. This article reports on a criminal probe of an alleged conspiracy by prosecutors and law enforcement officers to convict Rolando Cruz for kidnapping, rape, and murder of a ten-year-old girl. According to



U.S.C.A. section 1623 seem to yield support for this assertion.

*McAffee* illustrates the significance of the language "*same or continuous court or grand jury proceeding*." But this is just the beginning of the stinginess in construction of the statute. The witness' admission must rise to the level of an unequivocal repudiation of the prior testimony.<sup>134</sup> Something less may not suffice.<sup>135</sup> Fessing up to a law enforcement type may not be enough.<sup>136</sup> Perhaps the worst judicial day's work was the transmutation of the word "or" preceding the final condition set forth in section 1623 into an "and." This construction has carried the day!<sup>137</sup> The witness has to satisfy both of the final conditions!

If that is not enough, the courts have made it extremely difficult to satisfy either. Any "action" by the prosecutor<sup>138</sup> or grand jury<sup>139</sup> may trigger a finding that the declaration has "*substantially affected the proceedings*" before the recantation, rendering it ineffective. In *United States v. Crandall*,<sup>140</sup> the defendant provided a written statement repudiating his prior grand jury testimony to the prosecutors during the time when the grand jury was subject to recall, this meeting the "repudiation" and "continuity" requirements. The court even held that the written statement was the equivalent of a repudiation before the grand jury. But the defendant's recantation was still held to be ineffective because the grand jury

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this news excerpt, a perjury charge against police Lt. James Montesano was dismissed because during Cruz's (third) trial, he recanted earlier testimony given during a pretrial hearing (same proceeding?). It was Lt. Montesano's change in testimony at Cruz's trial that led to his acquittal by the judge, and launched the criminal probe into the conduct of the prosecutors and police. Recently, the judge reversed his earlier ruling and reinstated the perjury charge against Montesano. See Ted Gregory, *Officer Hit on Perjury in Cruz Case Again — Judge Changes His Mind About Cop's Testimony*, CHI. TRIB., Apr. 2, 1998, at 1.

134. *United States v. Tobias*, 863 F.2d 685 (9th Cir. 1988); *United States v. Spalliero*, 602 F. Supp. 417 (C.D. Cal. 1984).

135. *United States v. Scivola*, 766 F.2d 37 (1st Cir. 1985).

136. *United States v. Goguen*, 723 F.2d 1012 (1st Cir. 1983). (witness calling up an ATF agent and telling him that witness may have been in error in what he told grand jury did not cut it).

137. See, e.g., *United States v. Fornaro*, 894 F.2d 508 (2d Cir. 1990); *United States v. Scrimgeour*, 636 F.2d 1019 (5th Cir. 1981); *United States v. Moore*, 613 F.2d 1029 (D.C. Cir. 1979); *United States v. Swainson*, 648 F.2d 657 (6th Cir. 1977); *United States v. Denison*, 508 F. Supp. 659 (D. La. 1981). What happened to the notion that criminal statutes should be strictly construed?

138. Such as immunizing a witness. See *United States v. Tucker*, 495 F. Supp. 607 (E.D.N.Y. 1980).

139. The indictment of others will do, and there need be no detailed inquiry into the grand jurors' thought processes. See *United States v. Krough*, 366 F. Supp. 1255 (D.D.C. 1973).

140. 363 F. Supp. 648 (W.D. Pa. 1973).

had been deprived of the truthful testimony for two months!

Furthermore, as Neslund points out, the courts have interpreted the "*manifestation*" condition in a way that makes compliance virtually impossible. As Neslund puts it, "[i]t would be a rare case indeed where a witness could testify falsely and not be aware [<sup>141</sup>] that it *may become exposed* by any number of events, [<sup>142</sup>] only one of which would have to occur to bar recantation."<sup>143</sup> It seems to be enough if the witness himself has reason to believe that the false testimony "*will be exposed*."<sup>144</sup> Even if we do not judge the satisfaction of the condition from the witness' point of view, the prosecutor will almost always be able to contend that the perjury was manifest at the time it came out of the defendant's mouth.<sup>145</sup>

On the other hand, there is a sense in which this may be an unfair or incomplete assessment. Prosecutors probably elect not to prosecute in many cases (in most civil cases) in which the witness has fessed up along the line. But clearly, if the prosecutor wants the defendant badly enough, the case law (and the judge) will almost certainly prove accommodating.<sup>146</sup>

As an aside, let me point out another aspect of this fine mess that Congress has gotten us (lawyers) into. By the 1990's, the ethics pendulum had swung in the direction of "candor toward the tribunal." Model Rule of Professional Conduct 3.3 tells the advocate that the duty of candor trumps the duty of confidentiality.<sup>147</sup> If the

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141. That is, awareness to the witness. *See, e.g.*, *United States v. Denison*, 663 F.2d 611, (5th Cir. 1981) (exposure was manifest to witness before he recanted, even though the falsity of his testimony was not yet manifest to the grand jury and even if it had not yet substantially affected the proceedings; and the prosecutors and FBI had confronted him before he recanted). *See also* *United States v. Mazzei*, 400 F. Supp. 17 (W.D. Pa. 1975) (following defendant's appearance, his counsel was advised by the prosecutor that he considered the witness' testimony false and that he would seek an indictment; subsequent efforts to make clarifying statements to FBI agents were ineffective).

142. *See* Neslund, *supra* note 18, at 10-27 n.120.

143. *Id.* at 10-27.

144. *Id.* (citing *United States v. Swainson*, 548 F.2d 657 (6th Cir. 1977), among other cases).

145. *United States v. Swainson*, 548 F.2d 657 (6th Cir. 1977) (other witnesses had already testified to a previous transaction that the witness denied had occurred); *United States v. Camporeale*, 515 F.2d 184 (2d Cir. 1975) (prosecutors already had surveillance photographs contradicting witness' testimony); *United States v. Mitchell*, 397 F. Supp. 166 (D.D.C. 1974) (others had already divulged information sufficient to reveal that defendant's version of events was a lie).

146. Is it too cynical to suggest that the statutes are given a pro-prosecution spin because the usual target is a denizen of the world of organized crime, or a politician, or worst of all a criminal defense lawyer? The average Joe is simply not a likely candidate for prosecution.

147. *See* ABA Comm. on Ethics and Prof'l Resp., Formal Op. 87-353 (1987) (Lawyer's

client commits perjury, and if the lawyer comes to "know" of it "prior to the conclusion of the proceeding," the lawyer is supposed to take "reasonable remedial measures." According to Comment 11 to the Rule, the lawyer is to "remonstrate with the client confidentially" before doing anything rash (like attempting to withdraw or like (yikes!) disclosing the perjury to the court). I gather that this means that the lawyer is supposed to urge the client to recant and "purge"<sup>148</sup> himself of the misdeed. That is fine *in theory*. But now we are mugged by reality. The defendant is probably not real smart, but he is probably alert enough to come to the realization that if he recants, he will probably lose. The significance of the lie will, in at least some cases, be blown out of proportion. My guess is that in a capital case, the defendant will probably not choose to "come clean."<sup>149</sup> If the original charges are less serious, the advice to recant might actually verge on the realistic, and maybe even the sensible, but for the fact that almost no recantation will be deemed effective for purposes of the law of perjury. Would it not make more sense to either cut defendants or witnesses a little more slack, or rethink Rule 3.3, or both?<sup>150</sup>

### *Other Defenses*

Viola: In your denial I would find no sense;

I would not understand it.

William Shakespeare, *Twelfth Night*,

Act I, sc. v., lines 285-86

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Responsibility With Relation to Client Perjury); ABA Comm. on Ethics and Prof'l Resp., Formal Op. 93-376 (1993) (Lawyer's Obligation Where a Client Lies in Response to Discovery Requests).

148. The notion that it is possible for the witness to "purge" away the consequences of perjury seems silly, given the caselaw dealing with recantation. The notion may be traced to confusion with the concept of disavowal and purging of indirect criminal contempt. Even this doctrine as been watered down in the United States. That is, "purgation by oath," as it was once called, does not bar a prosecution for contempt but only serves to mitigate punishment. CHARLES TORCIA, WHARTON'S CRIMINAL LAW 393 (14th ed. 1981). See also Sentence Enhancement, *infra* notes 324-336 and accompanying text.

149. Do defendants still talk this talk?

150. As an Ethics Chairman, I am on dangerous ground here. But after thirteen years of listening to lawyers' true confessions and trying to "help," I probably have as much experience with this stuff as anybody else. I think that I can safely say that I have reached the point where I know so much about "legal ethics" that I know nothing. Such is the fate of the expert.

*Advice of Counsel*

When I get back on the street,  
there's one man whose ass I'll beat—  
My lawyer!

Anonymous<sup>151</sup>

In one widely cited case, a conviction was reversed because the witness “had not grasped the form of the question,” and was advised by his counsel that voluntary correction of his misleading statement was “not necessary or advisable.”<sup>152</sup> Here, the advice of counsel was considered important as a circumstance negating criminal intent. Note that in some circumstances, this kind of evidence may be rejected as contrived. Consider the case of *United States v. LeMaster*,<sup>153</sup> a prosecution under 18 U.S.C. section 1001. This case arose from a much ballyhooed FBI investigation of corruption in the Kentucky legislature. The investigation cost a lot, generated a lot of headlines, but netted few fish. The FBI charged legislator (and lawyer) LeMaster with extortion and interstate travel in aid of bribery, but, in the end, all they could prove was that he lied to an FBI agent. LeMaster had gone on a trip with a bribeester, Mr. Spurrier,<sup>154</sup> who was working undercover for the FBI. During the trip, LeMaster accepted some payments, allegedly the *quid pro quo* for his position on pending legislation. Here is a portion of the FBI’s interview:

- Q: Just to make sure that we have no confusion here, did anyone give you any cash while you were on that trip?
- A: Give me cash?
- Q: Um huh.
- A: No sir. . . .
- Q: Do you acknowledge that you received this pay . . . these payments from Spurrier?

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151. When I was in law school, this “poetry” appeared in a *Poetry Corner* of the A.B.A.J. I have tried unsuccessfully to find it. But I know I am not making this up. It is too choice!

152. *Beckanstin v. United States*, 232 F.2d 1 (5th Cir. 1956).

153. 54 F.3d 1224 (6th Cir. 1995).

154. For further exploits of Mr. Spurrier, see *United States v. Rogers*, 118 F.3d 466 (6th Cir. 1997).

A: No sir.<sup>155</sup>

There was little doubt that LeMaster had lied,<sup>156</sup> but he came up with an explanation, of sorts. During the FBI interview, he had consulted with State Senator Bradley, who was also a lawyer. He attempted to get into evidence that he had gone to Senator Bradley the day after the interview and told Bradley that he, LeMaster, had now remembered placing bets for Spurrier, which would have involved taking cash from him. Supposedly Bradley was willing to corroborate that LeMaster had given him this explanation, and that Bradley had told him that that was not the sort of thing that the FBI was interested in. The trial judge refused to admit the testimony of either, and LeMaster argued that this was error. He maintained that his out-of-court statements were admissible under the state of mind exception to the hearsay rule, proved that he had misunderstood the FBI agent's questions, and that his confusion negated intent. He did not "knowingly and willfully" make false statements during the interview.

The court affirmed the trial judge's ruling excluding the evidence. LeMaster was a lawyer who presumably knew the criminal law, he knew he was in trouble, and he had twenty-four hours to think something up. The evidence was not within the hearsay exception. Furthermore, what Bradley had to say reflected on Bradley's state of mind regarding the interview, and not LeMaster's. Nice try, but no cigar.<sup>157</sup>

### *The "Perjury Trap" Defense*

Queen: The lady doth protest too much, methinks.

William Shakespeare, *Hamlet*,  
Act III, sc. ii, line 240

Sometimes the claim is made that the government called the witness — now defendant — before a grand jury or legislative body solely for the purpose of questioning the witness in the hope of tripping him up or creating the perjury for which the defendant

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155. *LeMaster*, 54 F.3d at 1227.

156. The court rejected LeMaster's attempted use of the "exculpatory No" doctrine. *See* discussion; *infra*, beginning at note 301.

157. If you think LeMaster's "defense" was contrived, compare the peculiar conduct of another Kentucky lawyer in *Prichard v. United States*, 181 F.2d 326 (6th Cir. 1950), conduct that drew some acerbic comments from Judge John Noonan, Jr., in his PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER 122 (1997).

could be prosecuted. This entrapment argument is sometimes called the “perjury trap” defense.<sup>158</sup> It is based on the argument that the grand jury is the prosecutor’s turf, and that the witness (who is without benefit of counsel in the grand jury room) may be led into the pit by the wily inquisitor.<sup>159</sup> The “leading” case (the cases are few), *Brown v. United States*,<sup>160</sup> is also a very odd case. The prosecution for false testimony before a grand jury was under the old perjury statute, section 1621. The defendant was an IRS supervisor who had loaned out three of his employees to assist in a 1950 investigation of alleged corruption in the office of the Collector of Internal Revenue in St. Louis, Missouri. Apparently some bad blood developed between the defendant and some of the lead investigators — he had voiced his belief that the Collector had not done wrong. But the defendant was never personally involved in the investigation. The investigation did not bear fruit. Four years later, the defendant was sent by a new boss on an undisclosed special assignment to Omaha, Nebraska. When he arrived, he was shanghaied by the FBI and a special prosecutor, who interrogated him for two hours before a Nebraska grand jury (he was asked 365 questions, or thereabouts) about conversations that took place four years prior. Seven answers were “taken out of context” and formed the basis of an indictment for perjury. The defendant was convicted, but the Eighth Circuit reversed. The court viewed the entire exercise as a naked abuse of power. The Nebraska grand jury essentially had no legitimate inquiry before it. It was obvious to the court that the prosecutor had summoned the witness for the sole purpose of indicting him for perjury. The court reasoned that the tribunal was not “competent,” and that the allegedly false answers were not “material” to any matters legitimately before the grand jury.<sup>161</sup> A sensible result on the facts.

In subsequent cases, the “perjury trap” argument has been less

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158. For a primer on the subject, see *United States v. Weissman*, (unpublished disposition) 1996 WL 742844 (S.D.N.Y., Dec. 20, 1996). In the context of legislative committees, see *United States v. Cross*, 170 F. Supp. 303 (D.D.C. 1959) and *United States v. Icardi*, 140 F. Supp. 383 (D.D.C. 1956).

159. See *supra* notes 30-35 and accompanying text.

160. 245 F.2d 549 (8th Cir. 1957).

161. *Id.* at 555. The court cited *United States v. Icardi*, 140 F. Supp. 383 (D.D.C. 1956), which involved similar abusive conduct by a legislative subcommittee. In *Icardi*, the court opined that “if the committee is not pursuing a bona fide legislative purpose when it secures the testimony of any witness, it is not acting as a ‘competent’ tribunal . . . extracting testimony with a view to a perjury prosecution [is not] a valid legislative purpose.” *Id.* at 388.

successful, for so long as the grand jury is properly investigating crimes that relate to the witness' testimony, it is no defense or excuse that the prosecutor expected or even hoped for false answers by the witness.<sup>162</sup> In short, defendants who have cried "perjury trap" have, for the most part, "protested too much."<sup>163</sup>

### *Self-Incrimination*

A witness may be compelled to testify under a grant of immunity,<sup>164</sup> and the grant of immunity will apply only to past

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162. See, e.g., *Wheel v. Robinson*, 34 F.d 60 (2d Cir. 1994) (collecting cases); *United States v. Martino*, (unpublished disposition) 1988 WL 41468 (E.D. Pa., Apr. 28, 1988) (witness was not subpoenaed for the sole or primary purpose of extracting perjured testimony). See also *United States v. Williams*, 874 F.2d 968 (5th Cir. 1989) ("[T]he use of improper prosecutorial tactics does not automatically lead to the conclusion that the prosecutor's primary or sole intent in bringing appellants before the grand jury was to manufacture charges rather than to investigate crime."). Former Federal Judge Walter Nixon threw the "perjury trap" ball in the air in an unsuccessful effort to vacate his conviction for perjury before a grand jury. The court provided us with a thorough discussion of the "perjury trap" in *Nixon v. United States*, 703 F. Supp. 538 (S.D. Miss. 1988). See also *United States v. Regan*, 103 F.3d 1072 (2d Cir. 1997) (fascinating case in which a cop was called to testify before a grand jury investigating police misconduct; he was granted immunity, but he lied and was convicted of perjury; "perjury trap defense" and related "contrived materiality" arguments [that the government staged the investigation in order to elicit lies] were rejected).

163. *United States v. D'Amico*, (unpublished disposition) 1987 WL 11686 (S.D.N.Y., May 27, 1987) (government asked open-ended questions, in a manner totally unlike that employed in *Brown*). In *Marangello v. New York*, 563 F. Supp. 750 (S.D.N.Y. 1983), a *habeas corpus* petitioner advanced a creative, but unsuccessful, theory of "contempt trap," citing the *Brown* case. Compare *United States v. Brown*, 49 F.3d 1162 (6th Cir. 1995) (federal grand jury had authority to investigate "what might have been a federal crime," so perjury trap failed); *Gersten v. Rundle*, 833 F. Supp. 906 (S.D. Fla. 1993) ("perjury trap" cannot be asserted where plaintiff had not yet testified); *In re Grand Jury (Lahey) v. United States*, (unpublished disposition), 1989 WL 123627 (9th Cir., Oct. 4, 1989) ("Mere exposure to a perjury indictment . . . does not create an abuse of the grand jury process."). *Id.* at \*2.

164. In *United States v. Cintolo*, 818 F.2d 980 (1st Cir. 1987), a defense lawyer's conviction for obstruction of justice was upheld after he continued to advise his "client" (for the benefit of a third party) to assert the Fifth Amendment privilege even after the witness/client had been immunized. Cintolo's lawyers and helpful *amici*, including lawyers for the Massachusetts Ass'n of Criminal Defense Attorneys, advanced the proposition that "so long as an attorney tenders a facially legitimate explanation for conduct performed in the course of his defense of a client . . . a fact-finder must evaluate the behavior on that basis ["hidden motivations, however corrupt, remain forever hidden"] . . . to insulate lawyers from encroachments on the 'zealous representation' of clients accused of crime." *Id.* at 990. In other words, the *amici* called for the creation of a defense lawyers' exception to unpleasant criminal laws. Needless to say, the First Circuit did not endorse such a defense.

For the proposition that a lawyer may be charged with obstruction of justice when he or she advises a witness not to testify before a grand jury, if his or her motive is to protect his or her client as well as to safeguard the interests of the witness, see *United States v. Arnold*, 773 F.2d 823 (7th Cir. 1985); *United States v. McDuffie*, 1996 CCA LEXIS 251 (A.F.C.M.R.

offenses. The witness is not immune from a later perjury prosecution if he or she lies while giving the testimony.<sup>165</sup> Indeed, 18 U.S.C. section 6002 provides that:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to —

- (1) a court or grand jury of the United States,
- (2) an agency of the United States, or
- (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, *except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.*<sup>166</sup>

Still, there is some authority for the proposition that an indictment for perjury should be quashed, or a conviction set aside, for abuse of the grand jury process. In *United States v. Doss*,<sup>167</sup> the defendant had already been indicted for counterfeiting and

1996); North Carolina State Bar v. Graves, 274 S.E.2d 396 (N.C.App. 1981). Compare the odd case of *United States v. Sorberra*, 43 M.J. 818 (A.F.C.M.R. 1996) (in which private defense counsel advised military defendant to engage in conduct toward a witness which resulted in the client's conviction for obstruction of justice). See also *United States v. Baker*, 611 F.2d 964, 968 n. 3 (4th Cir. 1979) (alluding to the so-called "corrupt motive test"). What if there is no corrupt motive and the defense lawyer advises a potential prosecution witness not to testify? Professor Wolfram suggests that there is no problem in this event, but he cites a version of the *ABA Defense Function Standards* [§ 4-4.3(b) (1980 ed.)] which has since been changed. CHARLES WOLFRAM, *MODERN LEGAL ETHICS* 647 (1986). The Standards had relied upon ABA Comm. on Ethics and Prof'l Resp., Informal Op. 575 (1962).

For an interesting case involving the issue of disqualification of counsel, in which it appeared that the lawyers representing certain witnesses were advising the witnesses to "take the Fifth" to protect one of the lawyers and others, see *In re Investigation Before the February 1977 Lynchburg Grand Jury*, 563 F.2d 652 (4th Cir. 1977).

165. *United States v. Apfelbaum*, 445 U.S. 115 (1980) (all of the immunized testimony, whether parts of the testimony are truthful or untruthful, may be used); *Glickstein v. United States*, 222 U.S. 139 (1911). See generally Neslund, *supra* note 18, at 10-01[7].

166. 18 U.S.C.A. § 6002 (1986 & West Supp. 1998) (emphasis added).

167. 545 F.2d 548 (6th Cir. 1976).



narcotics offenses. The indictments were sealed, and defendant had no knowledge of them. Defendant was summoned before the grand jury. Although he was given Miranda warnings and had the opportunity to consult with counsel outside of the grand jury room, he was not told that he was already the subject of the sealed indictments. His counsel was (of course) not present during his questioning. He was asked about a counterfeiting transaction similar to, and closely related to, the transactions for which he was already under indictment. His false answer to a question was the subject of a perjury charge, for which he was convicted. In an opinion bristling with indignation and allusions to Star Chamber, the Sixth Circuit reversed. The rule that emerges is that, in the Sixth Circuit at least, "where a substantial purpose of calling an indicted defendant before a grand jury is to question him secretly and without counsel present without his being informed of the nature and cause of the accusation about a crime for which he stands already indicted, the proceeding is an abuse of process . . . [and] [i]ndictments for perjurious answers given in such a proceeding must be quashed because the proceeding itself is void."<sup>168</sup>

An unsuccessful variation on the self-incrimination theme, and a take off on the "perjury trap," is the "contempt trap" — an argument that witnesses advance to avoid testifying,<sup>169</sup> or to excuse the witness' contempt.<sup>170</sup> So far the argument has proven to be a loser.

### *Double Jeopardy*

One may assert the following as a rule, and assert it with some confidence. If defendant is tried for a crime, and defendant takes the stand and commits perjury, and is acquitted (or for that matter, is convicted!), then defendant may still be prosecuted for perjury for the false testimony given in that proceeding.<sup>171</sup> The logic of the

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168. *Doss*, 545 F.2d at 552.

169. *In re Grand Jury Proceedings [Lahey] v. United States*, 887 F.2d 1089 (9th Cir. 1989) (unpublished disposition), 1989 WL 123627 (9th Cir., Oct. 4, 1989).

170. *Marangelo v. New York*, 563 F. Supp. 750 (S.D.N.Y. 1983). Compare the defense posturing in the curious case of Susan McDougal on "Meet the Press," (Transcript) May 10, 1998.

171. See George Acock III, Note, *Nothing but the Truth: A Solution to the Current Inadequacies of the Federal Perjury Statutes*, 28 VAL. L. REV. 247, 276 (1993); Saad, *supra* note 24, at 877-78 (collecting cases). Of particular interest is the case of *United States v. Fayer*, 573 F.2d 741 (2d Cir. 1978). The court characterized its opinion as "the last chapter of

rule is that while defendant has the right to take the stand, defendant has no right to commit perjury,<sup>172</sup> and any false testimony about the past crime for which the defendant is on trial is distinct from the commission of the underlying crime. To put it another way, because there is no "identity" of offenses, there can be no claim of double jeopardy or *res judicata*.<sup>173</sup>

Of course there are exceptions to every rule. In some states, statutory law provides that a perjury prosecution may not be brought when the substance of the defendant's false statement is defendant's denial of guilt in a previous criminal trial.<sup>174</sup> Perhaps these statutes are a Janus-like double bow to human nature — the first bow in the direction of the defendant's natural instinct for self-preservation (much like cases recognizing the now discredited "exculpatory No" doctrine),<sup>175</sup> and the second bow in the direction of the prosecutor's natural desire to get the guy who "got off." Regarding the latter, there have been several federal decisions in my part of the country in which the appellate panels suggested that the prosecutions might properly have been dismissed because the facts suggested that the indictments would not have been sought had the defendants not been acquitted or had not successfully appealed and overturned earlier convictions.<sup>176</sup> On the other hand, the argument could be made that such suggestions were nothing more than *dicta*.<sup>177</sup>

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the sad story of a lawyer whose zeal on behalf of his clients led him into areas of such doubtful propriety that he himself was charged with complicity in his client's wrongdoing." The clients had bribed Goodwin, an FHA appraiser, who subsequently became a cooperative government ally with tape recorder. The clients and lawyer Fayer tried to persuade Goodwin not to testify before an investigating grand jury, urged him to fire his lawyer and hire a lawyer paid by Fayer's clients, and offered Goodwin a job in exchange for his cooperation. Lawyer Fayer was charged with obstruction of justice. He successfully defended and was acquitted, but he perjured himself in the process and was later convicted for that perjury!

172. *Nix v. Whiteside*, 475 U.S. 157 (1986).

173. *United States v. Williams*, 341 U.S. 58 (1951).

174. *See, e.g., Ky. Rev. Stat. Ann. § 523.070* (Banks-Baldwin 1994 & 1997 Cum. Supp.).

175. *See infra* note 301 and accompanying text.

176. *See United States v. Eddy*, 737 F.2d 564, 571-72 (6th Cir. 1984), discussed *supra* at notes 31, 36-40 and accompanying text; *United States v. McFadyen-Snider*, 590 F.2d 654, 655 (6th Cir. 1979).

177. In *Eddy*, the court alluded to "presumed vindictiveness" as (merely) a "second reason" for reversing the conviction. However, in *United States v. Adams*, 870 F.2d 1140 (6th Cir. 1989), the court spoke as if it were recognizing a new doctrine. The defendant had been convicted of making false federal income tax returns, and for committing perjury in an earlier sex discrimination suit against the EEOC (her employer). The appellate opinion held that the appellant was entitled to discovery on the issue of whether the decision to prosecute for income tax violations was retaliatory. The perjury conviction was reversed for lack of a showing of materiality. But the court also sounded off (in language that might have

Another exception to the general rule may arise in a case in which a jury has acquitted the defendant in a prior criminal trial, and the jury could not have acquitted without believing that the defendant's testimony was true.<sup>178</sup> Such cases of collateral estoppel may be rare,<sup>179</sup> but they do arise. For example, in *United States v. Sarno*,<sup>180</sup> the defendant was acquitted of bribing IRS agents. A subsequent perjury indictment based on defendant's alleged perjury at trial was dismissed since the trial judge found that the very same issues presented in the perjury case had necessarily been determined adverse to the Government in the bribery case. It has been suggested that collateral estoppel might not apply if the government can present newly discovered evidence that was not available to the prosecution at the first trial.<sup>181</sup>

We close our discussion of double jeopardy with a note on the remarkable *Ignatow* case out of Louisville, Kentucky.<sup>182</sup> Mel Ignatow murdered his girlfriend, and was acquitted of the charge. Along the way, his girlfriend's boss, the well meaning Dr. William Spalding, got suspicious, and sent a letter to Ignatow threatening him with execution by a gang of Cubans if he did not confess and tell where he had hidden the body.<sup>183</sup> This resulted in the good old Doc being convicted of terroristic threatening.

Ignatow testified against Dr. Spalding, and we will return to that testimony in a minute. Ignatow was also invited to present his side of the story to a federal grand jury, and that would prove to be his undoing. For in the end, the truth finally came out. Not long after Mel beat a state murder charge (his new girlfriend, who turned against him, and even admitted that she had been a participant in the torture slaying, *was not believed*), the new owners of Mel's old house had some carpet installed. The workmen found some of the victim's jewelry in a floor duct, along with several rolls of

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applied to the perjury charge as well as to the tax charge) that "a prosecution which would not have been initiated but for governmental 'vindictiveness' . . . is constitutionally impermissible." *Id.* at 1145.

178. For a discussion of this issue, see Note, *Perjury by Defendants: The Uses of Double Jeopardy and Collateral Estoppel*, 74 HARV. L. REV. 752 (1961).

179. Saad, *supra* note 24, at 877, n.105, collecting cases that recognize the principle, at least.

180. 596 F.2d 404 (9th Cir. 1979).

181. *Sarno*, 596 F.2d at 407; *Teague v. Kentucky*, 189 S.W. 908 (Ky. 1916); ROLLIN M. PERKINS, CRIMINAL LAW 522-23 (2d ed. 1969).

182. The case was the subject of newspaper reporter Bob Hill's book, *DOUBLE JEOPARDY: OBSESSION, MURDER, AND JUSTICE DENIED* (1995). See also Underwood, *Anthology*, *supra* note 8, at 369-373.

183. I know, it sounds crazy. But as Dave Barry would say, "I'm not making this up!"

videotape. The film showed Mel in the act of torturing and sexually abusing the murder victim. Ignatow was charged with lying to the FBI and to the federal grand jury, and was sentenced to eight years in the federal pen. Complaints of "double jeopardy" were properly rejected.

Still, Mel was looking forward to being released after a surprisingly short time (under the new Sentencing Guidelines) — his scheduled release was for *Halloween*, 1997.<sup>184</sup> Now a new state prosecutor decided to try again, and initiated state perjury charges based on Ignatow's testimony in Dr. Spalding's trial. The response from defense lawyers was predictable — "It's double jeopardy!; The prosecutor is being vindictive and being political!; The testimony at the Spalding trial *was not 'material!'*" Time will tell whether they "protest[ed] too much." The prosecutor intended to prove that Ignatow lied under oath during the Spalding trial about his "good relationship" with the victim at the time she disappeared. Here is the testimony. Remember that Mel had already murdered his girlfriend, Ms. Schaefer, according to his own confession. You decide if there was perjury.

[Ignatow being cross-examined by Spalding's lawyer, Tim McCall]:

Q: What was your relationship with her [Schaefer] on September 24, 1988 [the day of her disappearance]? Was it good?

A: It was good. And I loved her very much, and she loved me. And we were engaged to be married.

Q: She had not broken up with you, nor was she going to return jewelry to you that day? . . . It was an absolute, good, loving relationship?

A: That's correct.

Q: You parted on good terms when you last saw her?

A: What do you mean by "parted"?<sup>[185]</sup>

Q: The last time you saw her . . . everything was fine?

A: Yes. We intended to get together the next day, and as a matter of fact, we had made plans to do so.<sup>186</sup>

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184. Beverly Bartlett, *Ignatow to Be Freed from Prison on Halloween; Family of Woman He Killed Fears He'll Return to Louisville*, COURIER-JOURNAL [LOUISVILLE, KY.], Sept. 27, 1997, at 1A.

185. Comment would be superfluous.

186. Kim Wessel, *Ignatow Will Face Another Charge of Perjury; Woman's Killer Is Also Indicted as Persistent Felon*, COURIER-JOURNAL [LOUISVILLE, KY.], Oct. 24, 1997, at 1A.

Could there be a better candidate for *Nástrond*?

#### PERJURY LAW OUT IN THE COUNTRY

I trust I will be forgiven for once more referring to the law of the state of my residence. Kentucky is, happily, a relatively out of the way place, but its law is probably "typical" of that of most American jurisdictions. State laws adumbrated the "new" federal perjury statute, or have tracked the changes in federal law; and as we shall see, the proliferation of laws at the federal level, the "net-widening," has also taken place at the state level.

Under the Kentucky Revised Statutes ("Ky. Rev. Stat.") section 523.060,<sup>187</sup> a prosecution for perjury or false swearing requires corroboration — something more than contradiction by the testimony of a single witness, except in the case of a prosecution based upon inconsistent statements pursuant to Ky. Rev. Stat. section 523.060. In other words, as in the case of the federal law, some vestige of the so-called two-witness rule remains in theory, but a prosecutor may rely on something akin to the "new perjury statute." Ky. Rev. Stat. section 523.050 provides, in pertinent part:

[w]hen a person has made inconsistent statements under oath, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth inconsistent statements in a single charge alleging in the alternative that one or the other was false and not believed by the defendant. In such a case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.<sup>188</sup>

Like the "new" federal perjury statute, this worked a substantial change in the law, and lightened the prosecutor's burden. As is the case under federal law, retraction provides a defense, but the retraction must come "before such false statement substantially affected the proceeding and before it became manifest that its falsity was or would be exposed."<sup>189</sup> Under prior law, mere proof of contradictory sworn statements did not make out a sufficient

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187. KY. REV. STAT. ANN. § 523.060 (1995).

188. KY. REV. STAT. ANN. § 523.070 (1995).

189. For an untimely retraction, see *Price v. Commonwealth*, 734 S.W.2d 491 (Ky. Ct. App. 1987).

case.<sup>190</sup> The most interesting aspect of Kentucky perjury law is set forth in Ky. Rev. Stat. section 523.070. That statute provides that "[n]o prosecution shall be brought under this chapter when the substance of the defendant's false statement is his denial of guilt in a previous criminal trial."<sup>191</sup> Prior to the enactment of this statute in 1974, it was understood by the Kentucky courts that a defendant who perjured himself and secured an acquittal could still be indicted and convicted of perjury.<sup>192</sup> The breadth of the defense provided by the 1974 statute is not obvious; but one could argue that it should be narrow. That is to say, allow the defendant to make a false denial, but no more than that. Others would argue that it was intended to bar post-acquittal or post-conviction prosecutions for perjury based on any testimony by the defendant witness. Unfortunately, there are no cases one way or the other. Generally speaking, the authorities show little interest in prosecuting acquitted defendants, although they sometimes go after third parties, like alibi witnesses. In any event, whatever the scope of immunity provided in Ky. Rev. Stat. section 523.070, it seems consistent with prosecutorial expectations — "prosecutors say they expect criminal defendants who are indeed guilty to lie about their involvement in the alleged criminal activities," says the author of a recent article in the *American Bar Ass'n Journal*.<sup>193</sup> One assumes that the expectations are the same in federal criminal cases, and we have already noted that federal cases hold that an acquitted defendant may be prosecuted for perjury (except in rare cases of *collateral estoppel*),<sup>194</sup> and that a convicted defendant may get an extra hammering under the federal sentencing guidelines.<sup>195</sup>

#### ENFORCEMENT REVISITED

So far our review of the law of perjury has been rather sterile. With this necessary background out of the way, we can make things a little more interesting by addressing specific cases, and by introducing the human element.

This article began with some observations regarding the

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190. *Holland v. Kentucky*, 479 S.W.2d 903 (Ky. 1972); *Kentucky v. SESCO*, 132 S.W. 2d 314 (Ky. 1939); KY. REV. STAT. ANN. § 523.090 (1995).

191. KY. REV. STAT. ANN. § 523.070.

192. *Teague v. Commonwealth*, 189 S.W. 908 (Ky. 1916).

193. Curriden, *supra* note 3, at 72.

194. See also Joel E. Smith, *Acquittal as Bar to Prosecution of Accused for Perjury Committed at Trial*, 89 A.L.R. 3d 1098 (1978).

195. See *Sentence Enhancement*, *infra* notes 324-36.

enforcement of perjury laws. Subsequent discussions will make it rather plain that such laws tend to be invoked as a political weapon or as a crime-fighting weapon of last resort ("when you can't get 'em for anything else, get 'em on one of these").<sup>196</sup> Many times, the statutes are invoked to secure the "cooperation" of witnesses<sup>197</sup> and secure evidence against "really bad guys." "Not so bad guys" often get caught in the crunch.

Based on my admittedly unscientific study of the law of perjury, I would like to venture the following propositions: (1) hypothesis — when someone tells you "we are all in this together," they are probably lying to you; and (2) hypothesis — when prosecutors go hunting for whales, they often come up with very small fry.<sup>198</sup> I have in mind a couple of cases, the first being a series of events that I will lump together and call "The Ivan Boesky-Michael Milken-Drexel Burnham Lambert Fiasco."

It has been observed that "the white-collar defense lawyer's major professional chore is information control."<sup>199</sup> One of the more common, if dangerous, methods of controlling information is to gather together and represent the maximum number of people and convince them that non-cooperation is in all of their best interests.

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196. For cases, see JOHN T. NOONAN, JR., *BRISES: THE INTELLECTUAL HISTORY OF A MORAL IDEA* (1987) (prosecution of Japanese politicians in the Lockheed scandal, at 669-70; prosecution of Gulf executive, William Viglia, in Watergate spin-off, at 642; conviction of Texas Democrat, John Dowdy, in 1970). See also *Top Cult Figure Arrested in Japan*, *LA TIMES*, Oct. 7, 1995, at 5, relating how the leader of the Aum Supreme Truth cult, thought responsible for nerve gas attacks on the Tokyo subway system, was charged with perjury in an unrelated 1990 land deal as a way of bringing him in. There is also the matter of over-legalizing/"ethicalizing" things. The government asks us about everything, and the criminal law says that every answer we give, oral or written, sworn or unsworn, can get us in trouble under the criminal law. On that point, see PETER MORGAN AND GLENN REYNOLDS, *THE APPEARANCE OF IMPROPRIETY: HOW ETHICS WARS HAVE UNDERMINED AMERICAN GOVERNMENT, BUSINESS, AND SOCIETY* (1997).

197. My local paper included a short item about a witness (now incarcerated for "rioting") who testified at a murder trial that he saw X shoot Y. The trial ended in a hung jury. At the retrial of X, the witness testified that he did not see X shoot anyone. The headline is, of course, *Change in Testimony Spurs Perjury Charge*, *THE LEXINGTON [KY.] HERALD-LEADER*, Sept. 27, 1995, at B3.

198. Compare Dirk Johnson, *A Farmer, 70, Saw No Choice; Nor Did the Sentencing Judge*, *N.Y. TIMES*, July 20, 1994 (Seventy-year-old farmer who sold \$35,000 "out of trust" under his sister-in-law's name to keep the rest of his stock from starving was sentenced to prison for "perjury" under the unyielding Federal Sentencing Guidelines).

199. Charles Carberry, Book Review, *Kenneth Mann. Defending White Collar Crime: A Portrait of Attorneys at Work*, Yale University Press, New Haven, Connecticut, 1985, pp. 280, 16 *SETON HALL L. REV.* 290 (1986). See also Richard H. Underwood, Book Review, *Evan Thomas, The Man to See: Edward Bennett Williams — Ultimate Insider; Legendary Trial Lawyer*, 17 *J. LEGAL PROF.* 187 (1992).

But the problem of "conflicts of interest" is apparent.<sup>200</sup> "Although a stonewall defense may keep everyone from being indicted, if shattered, it might result in the lower-level executive facing charges he would have been immunized from (had he pursued a different course, and, dare I say it, "made a deal")."<sup>201</sup> And the "big fish" usually have "big time" lawyers who regularly farm out the representation of "allied" "little fish" to smaller firms who are dependent on such referrals.<sup>202</sup> Will these smaller firms protect the interests of the "little fish" they are nominally representing? Can they? Sometimes, when the smoke clears, there is a lot of room for finger-pointing. Consider the case of *United States v. Jones*.<sup>203</sup>

That story began with an inquiry by federal prosecutors into possible insider trading by Robert M. Freeman, a partner at Goldman Sachs & Co. in connection with a 1985 takeover bid by Princeton/Newport for Storer Communications, Inc., a cable TV company.<sup>204</sup> During this inquiry, prosecutors stumbled over one William Ward Hale, who told of a stock-parking scheme to create phony tax losses. Prosecutors "raided" Princeton/Newport, and came up with five reels of audiotape. The tapes had apparently been put aside, kept to "bolster contemplated, unrelated litigation,"<sup>205</sup> rather than recycled in the ordinary course. Later,

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200. See generally Jay Goldberg, *Multiple Representation of White Collar Targets and Witnesses During the Grand Jury Investigation*, 137 PLI/CRIM. 149 (1985). Examples of ethically questionable tactics for "information control" are alluded to in works like KENNETH MANN'S *DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (1985). See also Carberry, *supra* note 199, in which the following observation is made regarding "hanging together": "[S]maller defense firms may be dependent on larger firms for referrals that generate a good portion of their income . . . Although a stonewall defense may keep everyone from being indicted, if shattered, it might result in the lower level executive facing charges he would otherwise have been immunized from." *Id.* at 290.

The "we're all in this together" strategy has been obvious in the White House's response to the Whitewater/Jones/Lewinsky investigation. Compare Mark Miller, *A Privileged Character? The President and Joint Defense*, 85 GEO. L.J. 1979 (1997) ("The [joint defense] privilege has been the subject of controversy among litigators and disarray in the courts. Prosecutors generally call the privilege institutionalized obstruction or a license to conspire. . . ." (citing Deborah Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 FORDHAM L. REV. 871, 879 (1996)); Matthew Fosgren, Note: *The Outer Edge of the Envelope: Disqualification of White Collar Criminal Defense Lawyers Under the Joint Defense Doctrine*, 78 MINN. L. REV., 1219, 1232-33 (joint defense doctrine allows defendants to shape testimony and, "coordinate perjury"; and it can be used to keep the less culpable defendants in line by following the "stonewall" defense).

201. Carberry, *supra* note 199, at 297-98.

202. *Id.*

203. 900 F.2d 512 (2d Cir. 1990).

204. Sherry R. Sontag, *Anatomy of Two Cases; RICO Had a Smashing Debut on Wall Street*, NAT'L L.J., Sept. 4, 1989, at 1.

205. *Id.*



when Hale was called to testify in the case of *Matter of Freeman*,<sup>206</sup> Hale testified that in the trades that he himself questioned, he had dealt with the firm of Drexel Burnham through Bruce Newberg and his assistant, Lisa Ann Jones.<sup>207</sup>

The fishermen pursued their leads, and in 1987, they subpoenaed Ms. Jones, compelling her to testify before a Manhattan grand jury. Since they were interested in her superiors at Drexel Burnham, the prosecutors immunized her from prosecution — all except for perjury or obstruction of justice.<sup>208</sup> (The object was to get Newberg through Jones and to get Milken through Newberg.) Representing her during these grand jury proceedings were the same lawyers who were representing Drexel Burnham in the larger probe. It appears that federal prosecutors warned them in Jones' presence (she had gone to pieces) that they believed she had been perjuring herself when she testified that she could remember no conversations about stock-parking transactions. She had said "I don't know" or "I don't remember" or the like, at least seventy-two times, and also denied having any recollection of having made certain calculations of interest costs charged by Drexel to Princeton/Newport for holding bonds — critical aspects of the stock-parking deal.<sup>209</sup> As it turned out, she had been lying to protect her boss, Bruce Lee Newberg. She also lied about her own background — about her age and education — facts which she had lied about to, or concealed from, her employer when she applied for her job. What she did not know during her several grand jury appearances was that the prosecutors had her conversations with Princeton/Newport on tape, and that a prior grand jury witness had already spilled the beans. It was not until prosecutors notified her "Drexel" lawyers that they were considering seeking an indictment against her for perjury, some three months after her grand jury testimony, that these lawyers acknowledged her need for independent counsel.<sup>210</sup>

The "Drexel lawyers" referred her to Brian O'Neill. Mr. O'Neill was a partner in a smaller firm, and at various times in the larger

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206. *Matter of Freeman*, (unpublished disposition) 1987 WL 13738 (S.D.N.Y., July 9, 1987).

207. *Id.*

208. *United States v. Jones*, (unpublished disposition) 1989 WL 6668 (S.D.N.Y., June 14, 1989).

209. Rita Henley Jensen, *How Did Lisa Ann Jones Get Caught in the Vortex . . . ?*, NAT'L L.J., SEPT. 4, 1989, AT 1.

210. Compare ABA RULES OF PROF'L CONDUCT.

inquiry, O'Neill represented five other Drexel employees.<sup>211</sup> Now, it is a *possibility* that Ms. Jones had not "simply lied." She may have had some psychological problems, a "dissociative disorder" on account of her abuse as a child. A psychiatrist offered this suggestion in an article in *The National Law Journal*.<sup>212</sup> But this possibility was not exploited by Mr. O'Neill. His strategy throughout was that she had testified honestly before the grand jury proceedings in every instance in which she said "she could not remember" something. This was not an ideal strategy, if for no other reason than the fact that Mr. O'Neill at one point had dictated and sent a letter, without going over it with his client (this fact was in dispute), that she "now remembered" having conversations similar to those that she denied when she was before the grand jury.

At Ms. Jones' trial for perjury (for making false declarations before a grand jury in violation of 18 U.S.C. section 1623, and for obstruction of justice under 18 U.S.C. section 1503<sup>213</sup>), the prosecutor began his cross-examination by getting her to again deny having had the critical conversations admitted to in the letter that had been sent by O'Neill. When Ms. Jones answered, "I don't know," to questions about such "similar conversations," her case went down the drain. The prosecutor now suggested that there might be more charges against Ms. Jones, and even put the heat on Mr. O'Neill — the prosecutor alluded darkly to the lawyer's professional responsibility to prevent perjury!<sup>214</sup> Experts hired by Ms. Jones would later argue that this gave Mr. O'Neill the incentive to protect himself rather than the client — by skirting a defense based on Jones' consistent loss of memory and mental confusion ("dissociative disorder") in favor of wishful thinking (the hope that he could keep the recantation letter out of evidence).<sup>215</sup> The prosecutor then moved on to Jones' lies about her past, bad facts that could have been admitted on her direct examination for the purpose of "removing the sting" of anticipated cross-examination.<sup>216</sup> Here is what happened:

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211. Jensen, *Vortex* . . . ?, *supra* note 209, at 1.

212. *Id.* I should state, at this juncture, that both the psychiatrist and I may be engaging in "Monday morning quarterbacking."

213. 18 U.S.C.A. § 1502 (1986 & West Supp. 1998).

214. See *infra* notes 240-256 and accompanying text for a discussion of this issue. See also *United States v. Jones*, 900 F.2d 512, 516 (2d Cir. 1990).

215. *Id.* Among the experts was Geoffrey Hazard, the reporter for the ABA Model Rules of Professional Conduct.

216. Basic, dare I say it, "law school" stuff.

Q: Did you ever enroll in California State University at Northridge?

A: I don't remember. . . .

Q: Are you telling us that when you told the grand jury that you went to California State University at Northridge, you honestly believed that you had gone there?

A: Yes.

Q: What was it that made you believe that you had gone to California State University at Northridge.

A: I don't know.<sup>217</sup>

If Mr. O'Neill had had a "shrink" on deck, he might have argued that this testimony was *prima facie* evidence that Ms. Jones was out of her mind. The testimony was that bizarre. But he called no "memory expert" or "psychiatrist." Ms. Jones' goose was cooked. She must have been lying when she told the grand jury that she "could not remember" the conversations that were on the tapes that were now in evidence, for all to hear.<sup>218</sup> She was convicted, and ended up getting more time than Mr. Newberg,<sup>219</sup> even after a post-appeal reduction in her sentence!<sup>220</sup> And although Mr. Milken got more time, he also came away with much of his ill-gotten gains — some would say that "crime did pay" for him. Her appeal alleging conflict of interest was given short shrift.<sup>221</sup> The appeals court did not find the alleged conduct sufficiently compelling or concrete. In the end, all counsel were in the clear. Still, a scary scenario, and a valuable cautionary tale.

I end our discussion of the basics with a curious and sordid tale — a long way (perhaps not such a long way, geographically) from Wall Street — arising out of the Brooklyn D.A.'s pursuit of one Eric Jackson (a.k.a. "Eric Knight" and "Eric Jackson-Knight"), for arson and related murder arising from a 1978 supermarket fire that took the lives of six firefighters, and a 1991 rape and murder of a pregnant, homeless woman who lived in an abandoned concession

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217. Jones, 1989 WL 66668 at \*6.

218. Jensen, *Vortex* . . . ?, *supra* note 209, at 1.

219. Rita Henley Jensen, *Payment Suspended for Lisa Jones*, NAT'L LJ., June 24, 1991, at 40. Two months after Jones was jailed, Drexel stopped payments to Jones' attorneys (O'Neill's replacements), although they had explicitly agreed to shoulder the costs of her defense.

220. Rita Henley Jensen, *Securities Actions*, NAT'L LJ., July 22, 1991, at 6. Jones was the only Drexel employee, other than Michael Milken, to be jailed in connection with the investigation.

221. United States v. Jones, 900 F.2d 512 (2d Cir. 1990).

stand at Coney Island.

The prosecutor's quest led to a somewhat unsatisfying end — the perjury conviction of the unwilling and mercurial prosecution witness, Christine Moroney, who had originally identified Jackson-Knight as the killer of her Coney Island "roommate," Linda Casella. On November 30, 1991, Ms. Moroney returned to their digs after an appointment for her methadone treatment. "When she saw a man having sex with her friend (the very pregnant Ms. Casella), she walked away, she said; when she returned, the man emerged wearing a blood-stained shirt. Ms. Casella [had been] beaten and strangled."<sup>222</sup> Maroney claimed that she chased the man down Surf Avenue before he doubled on her and scared her off. She identified Eric Jackson-Knight in a police line-up. Jackson-Knight was arrested while in court, attending a hearing relating to his retrial for the supermarket arson-fire. His conviction in an earlier trial had been set aside in 1988 by a judge who found misconduct in the prosecutor's failure to turn over notes indicating a possible accidental origin for the fire.<sup>223</sup> Then, too, there was the nagging detail that the firefighters' survivors had recovered \$13.5 million from the store chain, based on the evidence of a retired arson detective who concluded that the fire probably resulted from faulty wiring.<sup>224</sup>

The authorities had to contend with some "bad facts" in the new rape-murder charge, too. The DNA results from semen in the victim's body did not match Mr. Jackson-Knight. But the prosecution was not deterred; prosecutors came up with an odd witness and a disgusting theory. A prostitute testified that Jackson-Knight bought used condoms from her and may have smeared one on his victim!<sup>225</sup>

At this point, the drug-addicted Ms. Moroney became uncooperative. "House arrest" was not working out to her satisfaction. On her way to court, she yelled to passers-by,

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222. Jan Hoffman, *Murder Eyewitness Convicted Over 'Memory Loss,'* N.Y. TIMES, Jan. 30, 1994, at Y13.

223. *Id.*; Jan Hoffman, *Two Trials Later, Mystery Lingers Over Arson Case,* N.Y. TIMES, Aug. 21, 1994, at 45.

224. Hoffman, *Mystery Lingers*, *supra* note 223, at 45.

225. *Id.* It sounds like something a law professor would think of. Compare Richard Lempert, *Some Caveats Concerning DNA as Criminal Identification Evidence: With Thanks to the Reverend Bayes*, 13 CARDOZO L. REV. 303, 341, n.34 (1991) (use of DNA evidence might result in the release of the guilty in some bizarre scenarios, e.g., a woman might have unprotected consensual sex, and then be raped by a considerate rapist who wore a condom).

"Everyone come to see the show! I'm going to let him go!"<sup>226</sup> In the end, she testified under oath before the trial judge, without a jury present, that she did not remember the events of the crime, that she had chased a dog away from her abode, and that she did not recognize Eric Jackson-Knight. The prosecutor attempted to dismiss the case, but the trial judge sent the case to the jury anyway, without any testimony from Ms. Moroney. Jackson-Knight was acquitted. The jurors were interviewed, and at least some said that they thought he was guilty — but they would have needed more evidence to convict.<sup>227</sup>

The prosecutor went ballistic and charged Ms. Moroney with perjury. After deliberating two-and-a-half days, the jury found her guilty on two of six counts of perjury. Meanwhile, Jackson-Knight was acquitted in a retrial of the arson-murder of the firefighters,<sup>228</sup> and at last report was the proud owner of a "multi-million-dollar lawsuit for wrongful imprisonment and malicious prosecution," but some still harbored the suspicion that Jackson-Knight may have been guilty and may have beaten the system.<sup>229</sup>

As for Ms. Moroney — her conviction was set aside on the ground that the prosecution had treated her unfairly. Apparently, the judge believed Ms. Moroney's claims that she had been abused and "held prisoner" to get her to "put an innocent man in jail."<sup>230</sup> Indeed, she claimed that the police withheld medication from her, beat her, and threatened to kill her if she refused to testify "their way."<sup>231</sup> The prosecution — formerly the hunter — became the hunted. Critics contended that prosecutors had not been deflected by the DNA results because they were out to get Jackson-Knight. It was suggested that the prosecutors had been too ready to deal with a convict by the name of Julio Cruz, who was the one who claimed that Jackson-Knight had confessed to him regarding the arson-murder. Mr. Cruz's reward was a deal — he was "sprung" from his prison cell. *The New York Times* reported that after his release, Cruz killed his girlfriend's two-year-old son "by smashing him on the dashboard of a car. He threw the body into a

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226. *Lempert, supra* note 225, at 341, n.34.

227. *Id.*

228. His original conviction was reversed, in part, because the prosecution had not disclosed information that might have been helpful to the defense. See Hoffman, *Mystery Lingers, supra* note 223, at 45.

229. *Id.*

230. *Id.* at 15, section 4. Compare the tactics in the "Fatty Arbuckle" case in Underwood, *Anthology, supra* note 8, at 344-49.

231. Patricia Hurtado, *Homeless Perjury Trial*, *NEWSDAY*, Jan. 25, 1994, City at 86.

dumpster." Cruz plea-bargained, served six years, and at last report, was working as a paralegal!<sup>232</sup> *O tempore! O mores!*

### WIDENING THE NET

Duke: We have strict statutes and most biting laws.

William Shakespeare, *Measure for Measure*, Act I, sc. iii, line 19

Here are some of *our* "most biting laws."

#### Section 1622. Subornation of perjury.

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than \$2,000 or imprisoned not more than five years, or both.<sup>233</sup>

#### Section 1001. Statements or entries generally.

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative or judicial branch of the Government of the United States, knowingly and willfully —

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statements or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to —

- (1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support

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232. Hoffman, *Mystery Lingers*, *supra* note 223, at 15, section 4.

233. 18 U.S.C.A. § 1622 (1986 & West Supp. 1998).

services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.<sup>234</sup>

Section 1512. Tampering with a witness, victim, or an informant . . .

(b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to —

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to —

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's identity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or . . . shall be fined by not more than \$250,000 or imprisoned not more than ten years, or both . . .

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234. 18 U.S.C.A. § 1001 (1986 & West Supp. 1998). This section was totally revised by Pub. L. 104-292, § 2, 110 Stat. 3459 (Oct. 11, 1996). Prior to several small amendments during the 1980's and early 1990's, section 1001 provided:

Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (1948, as amended).

According to statements in *The Congressional Record*, Congress reacted quickly to restore the status quo following the Court's decision in *Hubbard* (decriminalized false statements to both Congress and the judiciary). See 142 CONG. REC. S11005-08 (1996 WL 565642). See also *infra* note 296.

(d) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.<sup>235</sup>

### SUBORNATION OF PERJURY

Desdemona: But now I find I had suborned the witness,  
And he's indicted falsely.

William Shakespeare, *Othello*,  
Act III, sc. iv, lines 152-153

Perjury; is that a moral wrong or something? You got a problem with that? . . . Does this go back to religious upbringing or something? . . . Now, honesty'll get you in a world of s\*\*t sometimes . . . Just remember something. Self-preservation: number one. You take care of you and the best way to do that is — you stay the f\*\*k out of this as far away from it as you can. And if that means you got to tell a goddam little lie, you slap your hand right up to that Good Book and lie like a son-of-a-bitch. And don't worry about it because, honey, there ain't enough room in hell for all the perjuring bastards in this world.<sup>236</sup>

Mr. Cummins had not a high regard for the truth. Perhaps when he goes to his ultimate reward, he will be proved wrong once again, and find some friends in *Nástrond*. In any event, the lesson is that getting others to perjure themselves is bad — *real* bad. Cummins was convicted of subornation of perjury, and his appeal was denied.<sup>237</sup>

The common law punished those who procured the making of false statements — those who intentionally caused perjury to be committed by another.<sup>238</sup> This procuring, instigating, or soliciting of perjury is commonly referred to as “subornation of perjury.” Proof of guilt required the conviction of the perjurer as well as proof that the party charged with subornation knew or should have known

235. 18 U.S.C.A. § 1512 (1986 & West Supp. 1998).

236. *United States v. Cummins*, 969 F.2d 223 (6th Cir. 1992). In other contexts, numerous modern philosophers, luminaries, and literati have harbored doubts as to the rewards of truth-telling. Consider the following exchange between the alleged artist, Gennifer Flowers, and writer Andrew Ferguson reported in ANDREW FERGUSON, *FOOL'S NAMES, FOOL'S FACES* (1997): Flowers: “I’ll tell you . . . whoever said, ‘The truth will set you free’ was full of s\*\*\*.” Ferguson replied, “I think that was Jesus.”

237. *Cummins*, 969 F.2d at 228.

238. See discussion in Underwood, *False Witness*, *supra* note 8, at 239-44.



that his or her conduct would bring about perjury.<sup>239</sup>

A recent federal disciplinary case from the Eighth Circuit documents a particularly sorry scenario of alleged subornation by a lawyer.<sup>240</sup> The lawyer represented a woman in a divorce and custody battle. The lawyer was surprised when his client's husband called a witness who testified that he, the witness, had had sex with the client/wife in a motel room in the presence of the couple's child. The lawyer obtained a recess and confronted his client in the empty courtroom. Alas, there were cameras and sound recording on this courtroom, and *the court reporter had left everything running*. Here is what transpired and was preserved for the benefit

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239. See *United States v. Standifer*, 40 M.J. 440 (1994) (elements of crime of subornation of perjury under the UCMJ, quoting the *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (1984)). In this interesting case, the defendant had solicited a potential exculpatory witness to testify falsely but did not call the witness to the stand. The prosecution then called her, elicited perjured testimony that was consistent with defendant's testimony as to his innocence, and then argued that she and defendant had concocted a bogus story. While the court made it clear that the party accused of subornation need not call the witness who falsely testifies to the stand if he intends that the testimony get into the case (and thereby mislead the court and corrupt the judicial process), the court ruled that, in this case, the defendant not only did not call the witness to the stand, but also had no reason to believe that the prosecution would call her to the stand. Under these circumstances, the defendant could not be held accountable. "To hold otherwise would create the irony of upholding a conviction of an accused for subornation of perjury in a given case even if the accused decides to forgo calling his own witness to prevent possible perjury." *Id.* at 445. See generally William Genego, *The New Adversary*, 54 BROOKLYN L. REV. 781 (1988).

240. *In re Attorney Discipline Matter*, 98 F.3d 1082 (8th Cir. 1996). Reported opinions involving charges of subornation against lawyers are hard to find, but they are out there. For an interesting case in which a lawyer was convicted of subornation, but the conviction was later reversed on the ground that the lawyer was prejudiced by a joint trial (that his motion to sever in the trial court should have been granted), see *United States v. Echeles*, 352 F.2d 892 (7th Cir. 1965). For federal cases imposing money sanctions on lawyers for suborning perjury, see *Mackler Productions, Inc. v. Turtle Bay Apparel Corp.*, (unpublished disposition) 1997 WL 269505 (S.D.N.Y., May 21, 1997); *Tedesco v. Mishkin*, 629 F. Supp. 1474 (S.D.N.Y. 1986).

The *Mackler* opinion is particularly interesting. It involved a civil action to recover payment for goods that had been sold and delivered. After a trial, the judge awarded plaintiff compensatory and punitive damages, the punitive damages based on the theory that defendants had deliberately "stiffed" the plaintiff and had acted fraudulently and in bad faith. These damage awards were affirmed on appeal. See 47 F.3d 1158 (2d Cir. 1995). What got defense counsel in trouble was the testimony of one of his witnesses, a Ronald Hoffman, who testified that the signature "C. Hoffman" on a critical document was his own signature. It was actually the signature of a Cindy Hoffman, who was an employee of plaintiff. Mr. Hoffman was quickly caught in the lie by opposing counsel and the trial judge. He reiterated his testimony even after being warned of the penalties for perjury, but was nailed when he was forced to produce his driver's license — the signatures did not match. The judge referred the matter to the United States Attorney. Hoffman later pled guilty to perjury, and in the process, turned on counsel, claiming that he had told him to lie. After a hearing on the sanctions motion, the trial judge believed Hoffman's story and rejected counsel's explanations.

of the prosecutor and bar counsel:<sup>241</sup>

Lawyer: What about the business about the [motel]? Did that happen?

Client: Yeah, it happened.

Lawyer: God-damn. What were you thinking about?

Client: She was only three months — I mean eighteen months. I couldn't leave him. I don't know. I don't know.

Lawyer: You better deny this. Eighteen months old, Jesus.

Client: Well, she wasn't even eighteen months in '86. She was a little bitty baby. She was still in diapers. She was born in '85, in '84, December of '84. In '85 she was about a year, but I was not seeing him in '86 because right after the court date, right after my court date, me and [ ] were still talking, and I did see him then.

Lawyer: So that didn't happen in October of '86?

Client: No, it wouldn't have been October.

Lawyer: You better deny this, buddy. You better deny it. . . .

Lawyer: The thing that hurts you is taking the kid in the room and s\*\*\*\*ing with the kid in the room. He said that you two had sex in the bed next to your kid, your little kid was in the other bed. You're going to have to do something with it.

Client: What can I do with it that won't make it look like I'm lying?

Lawyer: I don't know. That's up to you. It could be your word against his. It's up to you.

Client: Are you saying that if I deny it then . . .

Lawyer: If you said it didn't happen, it didn't happen.

Client: I remember it happening in '86. It seemed to me that she was in diapers. She was little. I've left him so many different times, except the first time I filed was in '85, right?

Lawyer: Yeah, but think of your judgment . . . [etc.] . . .

Client: Well, she was little . . . [etc.] . . .

Lawyer: Well, what are you going to do about that? Are you

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241. *Attorney Discipline*, 47 F.3d at 1084-85. What about secret tape recording and attorney-client privilege? The opinion does not address these matters, but one assumes that any protests along these lines would have been raised in the lawyer's criminal trial and in his disciplinary proceedings, and that they must have been resolved against him under state law.

going to deny that or what?

Client: I don't know.

Lawyer: Well, it's up to you. It's up to you. Well, you[re] telling the truth when you say it didn't happen in '86. Okay.

Client: I don't remember it happening in '86, no.

Lawyer: This guy crucifies you.

Client: I know.

After the recess, the testimony went like this:

Lawyer: Okay. Now, in 1986, why . . . what would possess him to tell that you went to a motel with him, with your daughter?

Client: I don't know.

Lawyer: Did you think he was your friend?

Client: Yes.

Lawyer: What was the situation with him when you met [ ] when you were separated? Were you going out with [him]?

Client: No, I wasn't.

Lawyer: You dumped him for [ ]?

Client: No, I wasn't dating anyone.

Lawyer: You weren't dating anyone.

Client: No.

Lawyer: Do you ever . . . under oath now, do you ever *remember* going to a motel with your daughter with [him]? (emphasis added).

Client: No.

Lawyer: That's a lie, isn't it? ["It" being what the adverse witness had previously testified to?]

Client: Yes.

Lawyer: What would possess him to tell that?

Client: I don't know. . . .

Moving to cross-examination:

Counsel: So everything he said today was just fabricated . . .

Lawyer: Objection, some of it wasn't fabricated. The motel incident she said was fabricated.

Counsel: Everything relating to a sexual nature after 1984 was fabricated, correct?

Client: Yes.<sup>242</sup>

The lawyer was charged in Illinois with perjury and subornation of perjury, but was acquitted following a bench trial. The Illinois trial judge reasoned that the critical question was “do you ever . . . under oath now, do you ever remember going to a motel with your daughter with [the adverse witness the client had sex with]”; and that “[t]he question [was] prefaced as a test of memory, not as a test of whether something happened or did not happen?” Presumably, the judge was thinking in terms of literal truth, and determined that the client truthfully did not remember. But in Illinois, an acquittal in a criminal case does not bar a subsequent disciplinary action based on the same facts — the burden of proof is different, and the purposes of the criminal and disciplinary actions are different. Disciplinary tribunals in Illinois, and in Missouri, were not bound by the criminal action, and could consider the lawyer’s intent when he asked his client if she remembered going to a motel with the man. Both Illinois and Missouri authorities imposed discipline. The Supreme Court of Missouri disbarred the lawyer, finding that “the [lawyer’s] question and [the client’s] answer were designed to prove that [the client] had never been to a motel with her daughter and [the adverse witness]. From his recess consultation, [the lawyer] knew this was not true.”<sup>243</sup> The United States District Court for the Eastern District of Missouri did the same and disbarred the lawyer in Federal Court. The Eighth Circuit affirmed.

The published opinion in *Kentucky Bar Ass’n v. Wheeler*<sup>244</sup> recites a troubling set of facts leading up to a one-year suspension of a lawyer from practice.<sup>245</sup> Lawyer Wheeler’s clients, the Bilbreys, were local distributors of marijuana. One Sammy Richelle was busted by state police detectives with two pounds of the stuff in his possession. He told the cops that he had been to the Bilbrey property, where he had swiped the dope. He signed an affidavit to that effect, which the police used to get a search warrant for the Bilbrey property. Another seven pounds of the stuff was recovered in the search. Lawyer Wheeler met with Sammy — and Sammy had been “wired.” All of the conversations between the lawyer and the

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242. *Id.*

243. *In re Storment*, 873 S.W.2d 227, 230 (Mo. 1994).

244. 808 S.W.2d 803 (1991).

245. Note that in some states lawyers have been suspended for one year for non-criminal conduct such as failing to file a lawsuit before the expiration of the statute of limitations.

witness were being recorded for the benefit of law enforcement. According to the published opinion:

[Wheeler] told Rochelle that it would be worth untold sums to the Bilbreys if Rochelle would not admit going to the Bilbrey's residence, and if he would sign an Affidavit that his original Affidavit in support of the search warrant was incorrect. [Wheeler] told Rochelle he would have Jim Bilbrey contact him and that [Wheeler] did not want to know anything<sup>[246]</sup> about their discussion. At no time did Rochelle advise [Wheeler] that the Affidavit he had executed in support of the search warrant was based on false information.<sup>247</sup>

The clients then met with and suborned the witness, a new affidavit was prepared, and the rest was indictments, if not history. The clients were convicted of bribery, but what of lawyer Wheeler?

Wheeler was indicted for complicity in bribery, for perjury in the first degree by complicity, and for criminal solicitation to commit perjury. According to the reported opinion, "the Commonwealth Attorney did not believe he could obtain a conviction" of the lawyer. However, a subsequent newspaper account of the case indicates that the prosecutor thought he had a great case, but that the circuit judge "dismissed the indictment after concluding that Wheeler's [the lawyer's] culpability was 'very small' compared with the Bilbreys' [the clients']".<sup>248</sup> Again, quoting the judge, "Wheeler is a young attorney in the process of trying to establish a law practice, whereas the Bilbreys are charged with having in their possession great quantities of marijuana."<sup>249</sup> My advice to all lawyers is that they should assume that their conversations are being recorded,<sup>250</sup> and that they are probably not going to draw a

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246. In his article on "defensive" lawyering (see *infra* note 250, at 336 n.30), attorney-author John Wesley Hall, Jr. alludes to the federal pattern jury instruction on criminal knowledge set forth in 1 EDWARD DEVITT & CHARLES BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 14.09 (3d ed. 1977): "The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact. . . ." *Id.*

247. *Wheeler*, 808 S.W.2d at 804.

248. R.G. Dunlop, *Justice on Trial; Attorney's Attempt to Suppress Evidence Brought Only Suspension*, THE COURIER-JOURNAL [LOUISVILLE, KY.], June 4, 1995, at A17.

249. *Id.*

250. In *Defensive Defense Lawyering or Defending the Criminal Defense Lawyer from the Client*, John Wesley Hall, Jr., offers the following advice for staying out of trouble: "Say

judge who draws such fine distinctions.

### THE NEW "WITNESS TAMPERING" LAW

More recent legislative changes widening the net, or expanding the "field of fire" in terms of punishable conduct and "hostile" personnel, include 18 U.S.C. section 1957<sup>251</sup> (which makes it a felony for anyone to knowingly engage in a financial transaction with knowledge that the property involved is derived from crime), 26 U.S.C. section 60501<sup>252</sup> (which mandates the reporting of cash payments for services if they equal or exceed certain limits), and 18 U.S.C. section 1512(b)<sup>253</sup> (particularly the language defining obstruction of justice as including "misleading conduct" engaged in with intent to influence witness testimony).<sup>254</sup> While these new laws were promoted as weapons aimed at "gangster" types — thugs, drug dealers, and money launderers — they are not in the least bit discriminatory on their face. They are about as surgical as a claymore mine.<sup>255</sup> Criminal defense lawyers are definitely in the

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nothing or do nothing that you would be afraid or ashamed to read in the newspaper some day. Stated more bluntly, if the police or a grand jury listened to this conversation, what would they think?" 11 U. ARK. L. REV. 329, 330-31 (1988-89) (emphasis in original omitted). See also Bennett Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 403 (1992). See also Michael Higgins, *Fine Line*, ABAJ, May 1998, at 58 ("Would I be troubled if this were to be revealed in discovery?" — the practical test imposed by a law school dean).

Again, *the criminal defense lawyer might as well assume that he or she is being taped!* In addition to the many examples of taping provided in this article, see, e.g., *United States v. Marrapese*, 826 F.2d 145 (1st Cir. 1987) ("The witness contacted the government and was outfitted with a body tape recorder to wear to a meeting with Marrapese at Marrapese's lawyer's office. . . . The government subsequently charged Marrapese, his lawyer, and a third person . . . with conspiracy to suborn perjury. . . ."). *Id.* at 146.

251. 18 U.S.C.A. § 1957 (1986).

252. 26 U.S.C.A. § 60501 (1986 & West Supp. 1998).

253. 18 U.S.C.A. § 1512(b) (1986 & West Supp. 1998).

254. For a recent discussion of section 1512 and related statutes, see Alicia Dixon, Robert Kwak, & Catherine Morris, *Obstruction of Justice*, 34 AM. CRIM. L. REV. 815 (1997). Such statutes widen the net in a variety of ways. Note in this regard that perjury may obstruct justice, but the cases hold that perjury does not necessarily obstruct justice. See *In re Michael*, 326 U.S. 224, 227-28 (1945); *United States v. Essex*, 407 F.2d 214 (6th Cir. 1969). "A prerequisite to a conviction [for obstruction of justice] based solely on false testimony . . . is that the government must charge in the indictment and prove at trial that the testimony had the effect of impeding justice." *United States v. Martino*, (unpublished disposition) 1988 WL 41468 (E.D. Pa., Apr. 28, 1988).

255. In the course of imposing sanctions on a lawyer in a civil case, the trial judge alluded darkly to possible violations of 18 U.S.C. sections 1503 and 1512. *Clark Equip. Co. v. Lift Parts Mfg. Co.*, (unpublished disposition) 1987 WL 19150 (N.D. Ill., Oct. 27, 1987). The lawyer attempted to appeal and have the trial judge's opinion vacated. The appellate court held, however, that all issues were moot after the original parties to the underlying dispute settled and paid all the sanctions. The court shrugged off the lawyer's concerns on the

"kill zone"<sup>256</sup> — maybe even some prosecutors.<sup>257</sup> Jack Cade would approve of these laws.

I will address *professional ethics* in detail on another day, but a few things might best be said now about lawyers' complicity. We have already looked at the questions of whether and of when a lawyer may be charged with having "suborned" perjury within the meaning of section 1622. Now we will look at the matter of lawyer complicity under the new "witness tampering" statute, 18 U.S.C. section 1512.

Let us consider the problem of coaching. American lawyers ordinarily prepare their witnesses.<sup>258</sup> Most would consider it

theory that they were not "concrete" — they were "speculative." *Clark Equip. Co. v. Lift Parts Mfg. Co.*, 972 F.2d 817 (7th Cir. 1992). If the lawyer had not willingly "settled," shouldn't he have been given a chance to obtain appellate review of these accusations of "possible" violations?

256. See *United States v. Kalevas*, 622 F. Supp. 1523 (S.D.N.Y. 1985). In *United States v. Davila*, 698 F.2d 715 (5th Cir. 1983), the defendant and two others (one an attorney), were indicted for conspiracy to suborn perjury. The charges against the defendant were dismissed after he pled guilty to misprision of a felony. The lawyer and the other alleged conspirators were later acquitted of conspiracy to suborn perjury. Defendant thought that he might obtain relief from his conviction on the plea to misprision of a felony, but he was disappointed. The appellate court let the conviction stand, quoting language from the Supreme Court's opinion in *Standefer v. United States*, 447 U.S. 10, 25 (1980), that "while symmetry of results may be intellectually satisfying, it is not required." *Id.* at 721. *United States v. Ferreyra-Tagle*, 942 F.2d 794 (9th Cir. 1991) reported on a Peruvian lawyer who pled guilty to section 1512(b) witness tampering, but no details regarding the crime are provided.

257. *Question*: If a federal prosecutor threatens to revoke a witness' previously granted immunity if the witness testifies for another defendant, causing the witness to evade a defense subpoena, has the prosecutor violated 18 U.S.C. section 1512? Compare the turn of events reported by John Cheves, *Judge, Prosecutor Erred, U.S. Appeals Court Says* (referring to *United States v. Foster*, 128 F.3d 949 (6th Cir. 1997)), THE LEXINGTON [KY.] HERALD-LEADER, Nov. 5, 1997, at B1. Compare the conduct in *United States v. Hammond*, 815 F.2d 302 (5th Cir. 1987) (prosecutor imprisoned a defense witness to prevent the witness from testifying). On October 15, 1995, the *Chicago Tribune* ran a story by Eric Zorn, a reporter who has been relentless in his coverage of the alleged "framing" of Rolando Cruz on charges of kidnapping, rape, and murder. The story was styled *Tape Sinks Dupage Cop Deeper Into the Ooze of Lies*, CHL TRIB., Oct 15, 1995, at 1. The tape in question was from a security camera in a pawn shop. It recorded a 58-minute interview in which a potential state's witness, who recanted earlier testimony incriminating defendant Cruz, was being fed misinformation by the officer in order to get him to recant his recantation. Near the end of the interview, the officer allegedly said that the prosecutor "can play hardball, too" and "[\*\*\*] you, we'll arrest you for perjury." *Id.* Pretty rough stuff.

258. It is asserted that British, Australian, and Canadian lawyers view American practices as unethical, if not illegal. See, e.g., Karen L. K. Miller, *Zip To Nil?: A Comparison of American and English Lawyer's Standards of Professional Conduct*, CA32 ALI-ABA 199 (1995), at 203. It is true that barristers follow the guild rule that prevents them from interviewing witnesses, except clients and expert witnesses. *Id.* at 222 (citing CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES, ¶ 607.3, Annexe H(6) (1990)). But don't solicitors interview and prepare witnesses? Furthermore, it has been suggested that the "gingering" of expert witnesses is not unheard of in both civil and criminal cases. See CAROL

unprofessional not to go over the expected testimony with a witness.<sup>259</sup> Within limits — there are always limits — witness preparation is ethical.<sup>260</sup>

In a widely cited opinion, the Justices of the Supreme Court of North Carolina spouted the conventional [American] wisdom, and then some!

It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can.<sup>[261]</sup> . . . Nothing improper has occurred so long as the attorney is preparing the witness to give the witness' testimony at trial and not the testimony that

JONES, EXPERT WITNESSES (1994). Still, the American attitude is "wide-open" by comparison.

259. Compare *United States v. Funt*, 896 F.2d 1288, 1296-97 (11th Cir. 1988):

[Witness] was an accountant called by [Codefendant A]. [Witness] testified that an associate had prepared the chart reflecting coin orders and deliveries and that [Witness] had reviewed the chart, comparing it to the customer files. During the government's cross-examination, it became apparent that [Witness] was either lying or had been extremely slipshod. Defense counsel was informed that [Witness] in fact had not supervised the chart; in turn the defense lawyers told the court that they were concerned that the witness was committing perjury. The Court instructed the jury not to consider [Witness'] testimony against [Codefendant B], and granted [Codefendant C] a continuance to obtain another accountant. [Codefendant A's] motion for a mistrial was denied. [Codefendant A] now argues that he was entitled to a mistrial because, through no fault of his own, perjured testimony infiltrated the trial, prejudicing him and resulting in a miscarriage of justice. . . . This is not a case where the defendant is ambushed by the government, but instead a case where the defendant ill-advisedly chose to present evidence which was subject to devastating impeachment. In an adversary system, absent governmental misconduct affecting the evidence, a defendant must accept the consequences of the evidence he offers. Had the defense adequately prepared and examined [Witness] and his proposed testimony, the defense would not have permitted [Witness] to take the stand and suffer such impeachment.

*Id.*

260. See discussion in RICHARD H. UNDERWOOD AND WILLIAM FORTUNE, TRIAL ETHICS (1988); WILLIAM FORTUNE, RICHARD UNDERWOOD AND EDWARD IMWINKELRIED, MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK (1996) ("*Modern Litigation*"); Richard Wydick, *The Ethics Of Witness Coaching*, 17 CARDOZO L. REV. 1 (1995).

261. See *United States v. Poppers*, 635 F. Supp. 1034 (N.D. Ill. 1986) (it is not obstruction of justice to coach witness to present story in "best" light, as opposed to coaching a witness to lie). See also *Resolution Trust Corp. v. Bright*, 6 F.3d 336 (5th Cir. 1993) (it is not obstruction of justice or witness tampering to give a witness an affidavit with statements not previously discussed in it, or to attempt to persuade a witness, in an arms length interview, even aggressively, that her initial version of a certain fact situation is not complete or accurate).



the attorney has placed in the witness' mouth <sup>[262]</sup> and not false or perjured testimony.<sup>263</sup>

Where do we draw the line between preparation (permissible coaching) and subornation of perjury? Most of us "know [subornation] when we see it," even if we cannot come up with a definitional "litmus test." "There is a fine line between coaching someone to lie and coaching someone to present a story in the 'best' light."<sup>264</sup> Coaching, "woodshedding," or "horseshedding" of witnesses has been viewed as ethical, while the "gingering"<sup>265</sup> of witnesses has been condemned. Consider this language from *United States v. Root and Forde*:

Appellee Forde has injected a new element in oral argument not contained in his brief. He urges that an attorney in counseling his client has latitude in aiding the client in the presentation of the client's story at trial time. *Quaere*: Does this attorney-client relationship permit the client to relate a story manufactured by the attorney as Count One of this indictment charges? *Answer*: No.<sup>266</sup>

What follows is hardly a detailed catalogue of tricks used down at the woodshed.<sup>267</sup> From time to time, practitioners have tried to justify virtually every one of these techniques on the theory that

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262. What about the lawyer suggesting a substitution of terms, for example "cut" for "stab"? The practice of suggesting alternative words and phrases is widespread. *See* the interesting case of *Haworth v. Wyoming*, 840 P.2d 912, 914 (1992) (The prosecutor learned all about "weekend trial preparation sessions" from a deputy sheriff who was working off-duty for the defense lawyer!).

263. *State v. McCormick*, 259 S.E.2d 880, 882 (N.C. 1979) (citing ALAN E. MORRILL, TRIAL DIPLOMACY, Ch. 3, Pt. 8 (1973)). For a helpful bar association ethics opinion, *see* D.C. Comm. on Ethics, Op. 79 (1980). *See also* *United States v. Torres*, 809 F.2d 429, 434 (7th Cir. 1987) (to the effect that defense counsel invited an objection, which was sustained, and a reply from the prosecutor in closing argument, by persisting in characterizing as "sinister" the prosecutor's nine-hour session with a witness).

264. *United States v. Poppers*, 635 F. Supp. 1034, 1037 (N.D. Ill. 1986) (the latter is not obstruction of justice under 18 U.S.C. section 1503).

265. "Gingering" or "gingering-up" is a British term referring to improper rehearsal of a witness, amounting to spicing up the witness' testimony. *See* C.P. HARVEY, THE ADVOCATE'S DEVIL 65 (1958).

266. 366 F.2d 377, 383 (9th Cir. 1966) (spin-off of the Frank Sinatra, Jr. kidnapping affair).

267. For the techniques of coaching at depositions, *see In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 502 F. Supp. 1092, 1096-99 (C.D. Cal. 1980) (defendant's lawyers attempting to represent lower level employee and former employee witnesses, and control their testimony); *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993) (particularly harsh judicial criticism of coaching *during* depositions, and unusual rules or guidelines set forth).

"it's ok as long as the lawyer is trying to get the truth."<sup>268</sup> "All I did was tell the witness to listen to the question, and answer only the question — don't volunteer anything." For the most part this is good and ethical advice. But what does the lawyer mean to convey when he or she says that? What does the witness hear? Such advice can go "over the line."<sup>269</sup>

Some techniques are quite crude, and many lawyer coaches are quite bold. I have seen witnesses carry scripts<sup>270</sup> and cribnotes to the stand, despite the fact that scripts and cribnotes may be seized by the cross-examiner and turned against the witness.<sup>271</sup> Most

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268. See, e.g., James Altman, *Witness Preparation Conflicts*, 22 LITIG. 38 (Fall 1995). This is an excellent article, and Mr. Altman's purpose is to point out the ethical pitfalls. But as I will argue later, he may be too ready to dismiss criticisms of the standard techniques as "academic."

269. See Higgins, *supra* note 250, at 52. Altman, *supra* note 268, suggests that the lawyer might have gone over the line in *United States v. Ebens*, 800 F.2d 1422, 1443 (6th Cir. 1986), when she told witnesses how to answer questions "truthfully," but in a manner that would divert the examiner's attention away from the contents of a critical and "unfavorable" conversation. Can a list of instructions to witnesses handed out before depositions (in some venue such a song sheet is known as a "gouge") go too far? Much ink has been spilled regarding a document styled "points to make in an affidavit," which is now floating around in the latest Washington, D.C. sex scandal. The "talking points" were reprinted in *The Washington Post* on February 10, 1998 at A8. See also Michael Isikoff, *Diary of a Scandal*, NEWSWEEK, Jan. 21, 1998; Michael Isikoff and Evan Thomas, *Clinton and the Intern*, NEWSWEEK, Feb. 2, 1998, at 31, 37; *What Crimes Might Have Been Committed [in the 'Lewinsky affair']?* ORLANDO [FL.] SENTINEL, Jan. 26, 1998, at A10.

Sometimes it's hard to say whether any line has been crossed, even if something smells. For an interesting set of instructions, see *Accidental Exposure*, a piece published in *Harper's Magazine*, Jan. 1998, at 20-24, which sets forth the verbatim text of Baron & Budd's *Preparation for Your Deposition*. (Baron & Budd is a prominent Dallas, Tex. law firm specializing in class action tort suits.). See also *Special Report: Trial Conduct — Ethics of Witness Preparation* 48 ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT (FEB. 18, 1998). I like the line (a variation on the theme of "don't volunteer") that tells witnesses that "[a]t the deposition, it might help to pretend that you are a 'prisoner of war' in an enemy camp where you must give only your 'name, rank, and serial number.'" *Id.* One assumes that there is nothing wrong with this instruction in the abstract.

270. In his book, *Modern Legal Ethics*, Professor Charles Wolfram cites a case from 1880 in which a lawyer was disciplined for "writing out the answers" for a witness: *In re Eldridge*, 82 N.Y. 1961 (1880). CHARLES WOLFRAM, *MODERN LEGAL ETHICS* 647 n.96 (1986).

271. See, e.g., FED. R. EVID. 612. Unfortunately, not everybody "gets it." In my first or second year of practice with a firm, I faced an opposing witness in a tiny municipal court. During my opponent's direct examination, I kept objecting that the witness was reading a narrative that he (or someone) had prepared beforehand. He actually had the whole thing written out. The witness became so frustrated that he threw the script at me. I thought I was doing a great job, but the judge's puzzled looks turned to anger. He thought I was "being mean."

Unfortunately, the confused call the shots at all levels, and not just in the Municipal Court of Franklin County, Ohio. Who can forget the great moments in trial advocacy in the Iran-Contra hearings? Professor John Appelgate of the University of Cincinnati was watching too, but unlike me, he had the presence of mind to write some of it down. Here the

witnesses leave their scripts at home. They will not need them if they have been sufficiently "prepped."

Some lawyers get their clients and friendly witnesses to change their stories during rehearsal by wincing and throwing up their hands when a witness mentions a "bad fact." Some lawyers go so far as to say things like — "If you say that you'll lose . . . its all over . . . that's the ball game."<sup>272</sup> Some will say that such things do not happen, or that they occur only in the imaginings of lawyer-hating academics. But they *do* happen.

Almost as crude a technique is "group preparation," in which witnesses are prepared together, and coached to give "consistent" testimony. This used to be the sort of thing that one would expect only from law enforcement officers.<sup>273</sup> Now lawyers on both sides of the "v." are using the technique in civil as well as criminal cases.<sup>274</sup> Again, this sort of preparation can result in a waiver of privilege and work product,<sup>275</sup> but only if the lawyer "gets caught."

Perhaps, not quite so bad is the so-called "hub-and-spoke" method, in which group consistency is assured by separate interviews with members of the group, in which each is made aware of the testimony of others.<sup>276</sup> Another variation of the same theme is the way that a witness can be shown the error of their

questions are coming from Mr. Liman, counsel for the Committee, the answers are coming from Lt. Col. Oliver North, and the objections are coming from Mr. Sullivan, counsel for North:

Liman: [Y]ou are looking at a book there. What is the book, sir?

North: The book is made up of notes that I have made in trying to prepare with counsel for this hearing.

...

Sullivan: (objecting) Don't tell him what it includes.

Liman: Well, I think that if a witness is looking at something that I, as counsel, am entitled to see what he is refreshing his recollection with.

...

Sullivan: I think you are wrong. That is a product of lawyers working with clients. . . . That is none of your business. . . .

Liman did not argue waiver of work product or privilege (euphemisms for attorney-client privilege and work-product), and there was no one to rule on such fine points. Liman simply dropped the matter! See John Applegate, *Witness Preparation*, 68 TEX. L. REV. 277 (1989).

272. Compare Joseph Piorkowski, *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitation of 'Coaching'*, 1 GEO. J. LEGAL ETHICS 389, 398 (1987).

273. See *Ex Parte Brandley*, 781 S.W.2d 886 (Tex. Ct. App. 1989).

274. See Applegate, *supra* note 271, at 14-15, 37-38 (alluding to *United States v. Ebens*, 800 F.2d 1422 (6th Cir. 1986)).

275. *Id.*

276. *Id.* at 289 n.55 (alluding to *United States v. Townsley*, 843 F.2d 1070 (8th Cir. 1988)).

ways by placing their observations in "context" — "Well, that's not how your boss remembers it!"<sup>277</sup> Coercive, isn't it? On the other hand, is it wrong to compare the witness' recollection with other evidence if it will help him remember? This can be done at trial, at least up to a point. The witness' certainty could be tested by asking the witness if he or she "is aware of the boss' testimony," and so on. On the other hand, this cross-examination would be done in open court, and the court and the opponent could see if it were misleading and coercive. Again, arguments can be made both ways about the legitimacy of the technique.<sup>278</sup> It depends on the circumstances, and on the lawyer's intent, doesn't it?

Some argue that even the old-fashioned "lecture" is perfectly respectable if the lawyer *means well*. Most readers know that the "lecture" is the technique that was used by Jimmy Stewart (usually playing the epitome of the straight-shooter) to help his client come up with a "temporary insanity" defense in the movie, *Anatomy of a Murder*.<sup>279</sup> Before the defendant committed himself to a story, he was told about the defenses that might be available if only there were facts to support them. The defendant was not stupid, and more or less tried the defenses on for size.

Are any of these techniques "witness tampering" under the new criminal statute? Remember that a violation of 18 U.S.C. section 1512(b)(1) can be based on the lawyer's "*misleading conduct*" toward the witness, with "*intent to influence*" the witness' testimony in an official proceeding. That's all there is to a *prima facie* case.<sup>280</sup> It is an *affirmative defense*, that the defendant's

277. Piorkowski, *supra* note 272, at 399.

278. See Altman, *supra* note 268, at 40.

279. The 1959 movie was based on a 1958 play of the same name written by Michigan Supreme Court Justice, John D. Voelker, and published under the pseudonym, "Robert Traver." *John D. Voelker Dead at 87; Author of "Anatomy of a Murder"*, N.Y. TIMES, Mar. 20, 1991, at B9. Voelker based his novel on his experiences as a defense counsel in the early 1950's. *Id.*

280. In *Kiner v. Indiana*, 643 N.E.2d 950 (Ind. Ct. App. 1994), defense counsel falsely suggested to an eyewitness on the stand that an old photo was a photo of the defendant. When the witness bit and testified that she could have picked out the man in the photo as the defendant, counsel triumphantly announced that it was not a photo of the defendant. The court was not amused, and rebuked counsel for a violation of Rule of Prof'l Conduct 3.3(a)(1). Could a prosecutor in federal court charge the defense counsel with "witness tampering" by engaging in "misleading conduct"? Presumably, counsel would try to argue that he did it to get to the truth — that the witness couldn't actually identify the defendant. But the charge or threat of a charge might be successful in intimidating counsel. In any event, lawyers exhibit a dangerously cavalier attitude when it comes to section 1512. See, e.g., Michael Iskoff and Evan Thomas, *Clinton and the Intern*, NEWSWEEK, Feb. 2, 1998, at 31, 40: "Speaking not for attribution . . . several white-collar crime lawyers suggested that

lawyer must establish by a preponderance of the evidence, that his or her conduct "consisted solely of lawful conduct and that [the lawyer's] sole intention was to encourage, induce, or cause the other person to testify truthfully."<sup>281</sup>

Lawyer John Wesley Hall, Jr. provides "witness tampering" scenarios that might be encountered by a criminal defense lawyer:

Your client says "Witness B is going to say such-and-such about me. [1] I'm going to talk to him and get him to not be so positive against me. He knows the truth." [2] Worse, your client says "I'm going to show him why he needs to change his story." [3] Or worse, your client says "I'm going to pay him to shut up." [4] Even worse, your client says "I'm going to kick his \*\*\* [and show him who's boss]."<sup>282</sup>

Hall claims that a California lawyer was indicted under section 1512 "for telling witnesses . . . that they did not have to talk to government officers without consulting a lawyer."<sup>283</sup> This seems pretty far out; but then again, indictments are pretty much had (by

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Jordan may have coached Lewinsky in a way that subtly got the message across without exposing anyone to obstruction-of-justice charges. When preparing witnesses, a clever lawyer can ask questions that produce answers the lawyer wants to hear — without ever suggesting that the witness lie." *Id.*

281. 18 U.S.C. § 1512(d). This exercise in burden shifting has been ruled constitutional! *See, e.g., United States v. Clemens*, 658 F. Supp. 1116 (E.D. Pa. 1987); *United States v. Davenport*, 622 F. Supp. 1523 (S.D.N.Y. 1985). It has been suggested that this part of the statute was put in to head off "the possibility of a judge, prosecutor, or presiding officer violating the statute by threatening a witness with a perjury prosecution for false testimony." Judah Best and Virginia White-Mahaffey, *An Analysis of the Victim and Witness Protection Act of 1982*, 134 PLL/CRIM. 89. Of course, such warnings can go overboard and result in the reversal of a conviction if the defendant is deprived of the benefit of the witness' testimony. *See Webb v. Texas*, 409 U.S. 95 (1972); *United States v. Risken*, 788 F.2d 1361 (8th Cir. 1986).

In terms of excuses, the following thought should be considered: "[T]he payment of a sum of money to a witness to 'tell the truth' is as clearly subversive of the proper administration of justice as to pay him to testify to what is not true." *In Re Robinson*, 136 N.Y.S. 548, 556 (N.Y. App. Div. 1912).

282. Hall, *supra* note 250, at 332-33. Lawyers in civil cases are also subject to allegations of misconduct. For an interesting case in point, *see Red Ball Interior Demolition Corp. and John Palmadessa v. Daniel Palmadessa*, 908 F. Supp. 1226 (1995). In this classic case of closely-held corporation "squeeze out," involving brother against brother, allegations were made that plaintiff's counsel should be disqualified for making allegedly improper payments to a lay witness in violation of 18 U.S.C. section 201(d) (1994), and for allegedly misleading or threatening statements in violation of 18 U.S.C. section 1512(b). The judge denied the motion to disqualify. On the issue of payments to witnesses, *see ABA Comm. on Ethics and Prof'l Resp.*, Formal Op. 96-402 (1996) (Propriety of Payments to Occurrence Witnesses).

283. Hall, *supra* note 250, at 334.

the prosecutor) for the asking.<sup>284</sup>

In my own home state of Kentucky, a lawyer was recently suspended from practice following his conviction under section 1512(b)(1) for attempting to persuade another person not to testify in official proceedings.<sup>285</sup> The lawyer also got a fifty-seven month prison sentence!<sup>286</sup>

By expressing less than unalloyed enthusiasm for these new federal criminal laws, I do not want to leave the reader with the impression that subornation does not take place or that lawyers are harshly or unfairly treated when they "get caught." On the contrary, if the *Wheeler*<sup>287</sup> case is any indication, nothing could be further from the truth. My point is simply that section 1512 may sweep too broadly and invite abuse by the prosecution and law enforcement. The bad cases may end up going unpunished or going lightly punished while draconian measures are reserved for the trivial or even the innocent. Of course, some would say, "That's the Law."

While 18 U.S.C. section 1512 (the new federal witness tampering statute) applies only to federal proceedings,<sup>288</sup> state laws have also widened the net. For example, Kentucky law now punishes some "unsworn falsifications" (lies) intended to mislead any public servant in the performance of his or her duty. The Kentucky statute, Ky. Rev. Stat. section 523.100, only relates to certain written statements, false records or forged instruments, or false samples, specimens, maps, boundary marks, or the like, however.<sup>289</sup> The

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284. It is probably worth noting that a variety of allegations of misconduct of counsel may be advanced *post conviction*. The United States Supreme Court did lawyers a great disservice when it decided to cut off arguments in direct appeals through the application of "waiver and by-pass" rules, only to entertain substantially similar arguments in *habeas corpus* under the rubric of "ineffective assistance of counsel." Nowadays, the dissatisfied client (inmate) will almost certainly attack his former defense lawyer with a variety of creative (if not contrived) claims, all with the encouragement of a taxpayer-supported cadre of public advocates. The latest weapon is the claim that counsel was suspected of subornation, and that counsel therefore was "chilled" — prevented from furnishing sufficiently zealous advocacy — by threats from the prosecutor or the trial judge. "What fresh hell is this?" One may well ask. Compare *Johnston v. Love*, 1995 U.S. Dist. LEXIS 21426 (E.D. Pa., Oct. 18, 1995) (convicted murderer unsuccessfully raised claims that he should get a new trial because a witness suggested that defense counsel was accused of subornation by a witness, that the judge gave dirty looks to counsel, and that counsel was intimidated, failed to testify to rebut the witness' testimony, etc. . . .).

285. *Kentucky Bar Ass'n v. Zeman*, 828 S.W.2d 609 (Ky. 1992).

286. *See Zeman v. United States*, 1996 U.S. App. LEXIS 29444 (6th Cir., Nov. 7, 1996).

287. *See supra* note 244 and accompanying text.

288. *See McKinney v. Illinois*, 720 F. Supp. 706 (N.D. Ill. 1989); *Park South Assoc. v. Fischbein*, 626 F. Supp. 1108 (S.D.N.Y. 1986).

289. Ky. Rev. Stat. Ann. § 523.100 (Banks-Baldwin 1994 & 1997 Cum. Supp.).

statute is not as sweeping as 18 U.S.C. section 1001, which is discussed *infra*. Ky. Rev. Stat. section 523.110 makes it an offense to give a "peace officer" a false name or address with intent to mislead the officer as to one's identity.<sup>290</sup> However, the offender must first be warned that giving a false name or address is a criminal offense. It can be seen that in at least some states, legislators are not so enthusiastic about "widening the net" (lest they be caught up in it?). On the other hand, Kentucky is typical, to the extent that it has enacted a number of laws punishing acts amounting to "interference with judicial administration" — such as witness tampering through bribery, harassment, intimidation, or retaliation, or tampering with physical evidence and the like.<sup>291</sup> But nothing so sweeping as 18 U.S.C. section 1512 has been proposed.

#### FALSE STATEMENTS<sup>292</sup>

And the Lord said unto Cain, Where is Abel thy brother?  
And he said, I know not: Am I my brother's keeper?

*Genesis 3:11-12*<sup>293</sup>

The text of 18 U.S.C. section 1001 makes no mention of whether the oath is necessary. The statute punishes conduct that takes place outside adjudicative proceedings. Many find this statute worrying. Many would be surprised to learn that lying to a government agent is a major federal crime, in and of itself. Not only does the law seem to deny human nature; there is something *alien* about it. Some might think that this is the sort of thing one ordinarily associates with totalitarian societies.<sup>294</sup> Admittedly, lies not under oath can amount to actionable and criminal fraud (already proscribed by other laws), and can result in damage due to misdirection. But the possibilities for entrapment, harassment, and other abuses are legion. If you can't make your case, if you

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290. Ky. Rev. Stat. Ann. § 523.110 (Banks-Baldwin 1994 & 1997 Cum. Supp.).

291. See Ky. Rev. Stat. Ann. §§ 514.010-524.120 (Banks-Baldwin 1994 & 1997 Cum. Supp.).

292. For a recent survey of 18 U.S.C. section 1001, see Jennifer Bier & David Hibey, *False Statements*, 34 AM. CRIM. L. REV. 567 (1997).

293. The first shot at an "exculpatory No" defense?

294. Compare JOSEPH COTCHETT AND STEPHEN PIZZO, *THE ETHICS GAP* 92 (1991) (quoting (disapprovingly?) Professor (and defense lawyer) Michael Tigar as saying of one prosecution that it goes to show that citizens "should not talk to their government."). This is not a healthy state of affairs.

can't get your target for any apparent substantive offense at all, take a stab at it anyway, get them to lie, and then, get them for the lie. What you started out accusing them of need never be proved.

In a sense, the statute was born of war — war inevitably expands the power of the state.<sup>295</sup> An ancestor of section 1001 appeared during the Civil War as a measure to curb frauds perpetrated by military personnel. Congress tinkered with (broadened) this section from time to time.<sup>296</sup> In 1996, however, 18 U.S.C. section 1001 was revamped by Congress, as a direct result of the Supreme Court's decision in *Hubbard v. United States*.<sup>297</sup>

In prosecutions under section 1001, the defense of “literal truth”

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295. BRUCE PORTER, *WAR AND THE RISE OF THE STATE: THE MILITARY FOUNDATIONS OF MODERN POLITICS* (1994).

296. For a history of the pre-1996 statute, see *United States v. Bramblett*, 348 U.S. 508 (1955). *Bramblett's* holding that section 1001 applied to false statements made to all three branches of government was overturned by *Hubbard v. United States*, 514 U.S. 695 (1995). See also Neslund, *supra* note 18, at 10-47.

Congress was so disturbed by *Hubbard* that within days of the decision, Rep. Bill Martini (R-N.J.) introduced HR3166 to amend section 1001 to make it applicable to all three branches of the federal government, not merely the executive branch (as the statute had been interpreted by the *Hubbard* Court). A similar resolution was introduced in the Senate (S1734). Both resolutions passed their respective houses unanimously and emerged from the House-Senate Conference Committee under the title, “The False Statements Accountability Act of 1996.” See 142 CONGRESSIONAL RECORD, S11605-08 for statements made by various Senators in support of the act. At the same time, Congress also amended 18 U.S.C. sections 1515 and 6005, and 28 U.S.C. section 1365. Interestingly, until *Hubbard*, Congress ignored the gap in section 1001, although several decisions by the D.C. Circuit explicitly interpreted 1001 as only applicable to the executive branch. Notable among these decisions was *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995). See also *United States v. Brooks*, 945 F. Supp. 830 (E.D. Pa. 1996) (false statement in submission to Copyright Office does not violate 18 U.S.C. section 1001 — false statement not a crime if made before 1996 because this was not an “administrative matter” and Copyright Office is not a “department or agency” of the executive branch).

*Hubbard* was superseded by the 1996 change in section 1001, however, as recognized in *United States v. Oakar*, 111 F.3d 146 (D.C. Cir. 1997). Congresswoman Oakar was convicted by the United States District Court for the District of Columbia of providing false financial disclosure statements to the House Ethics Committee investigating a \$50,000 overdraft of her account at the infamous House Bank (among other charges). The court found that 18 U.S.C. section 1001 was inapplicable to Oakar because the false statements were made in May 1992, but noted that the False Statements Accountability Act of 1996 amended the statute, “expand[ing] its reach to the judicial and legislative branches.” *Oakar*, 111 F.3d at 158 n.1.

297. See *supra* note 234 for the complete text of 18 U.S.C. section 1001 (1996). The 1996 version deletes the vague and problematic, “any department or agency of the United States” (construed by the *Hubbard* Court as applying only to the executive branch) and substitutes “the executive, legislative, or judicial branch of the Government of the United States.” The new subsection (b) provides that section 1001(a) is inapplicable to judicial proceedings. The new subsection (c) covers matters within the jurisdiction of the legislative branch, specifically applying section 1001(a) to administrative matters of the Congress and House and Senate hearings and investigations.



is available,<sup>298</sup> as is a related defense that the defendant reasonably believed the statement to mean something that was not false.<sup>299</sup> Furthermore, until the United States Supreme Court's decision in *Brogan v. United States*,<sup>300</sup> the sweep of section 1001 had been limited by two very important lines of authority. The first was the now discredited exception for the "exculpatory No." Under this doctrine, a simple denial of culpability in response to an investigatory question could not form the basis for a prosecution.<sup>301</sup> This judicial doctrine, at least, took some account of human nature and human frailty. But even in the heyday of the "exculpatory No," there was disagreement as to the applicability of the statute when the alleged offender had gone further and said something more affirmative to mislead the investigating agent.<sup>302</sup> The second limitation was derived from the language of the statute itself. That is, the statute applied to "matters within the jurisdiction of any department or agency of the United States."<sup>303</sup> According to the United States Supreme Court decision in *Hubbard v. United States*,<sup>304</sup> a federal court was neither a "department" nor an "agency." Prior to *Hubbard*, many lower courts had already reached a similar result by relying on a judge-made "judicial function exception." According to this doctrine, false statements made to a court while the court is performing its adjudicative function were not covered by section 1001.<sup>305</sup> For example, the Sixth Circuit took

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298. See Neshund, *supra* note 18, at 10-44 (citing *United States v. Adler*, 62 F.2d 1287 (8th Cir. 1980)).

299. See Neshund, *supra* note 18, at 10-43-44, collecting the cases; Bier & Hibley, *supra* note 292, at 582.

300. *Brogan v. United States*, 118 S. Ct. 805 (1998).

301. For discussions of the "exculpatory No" defense, see Sandra Turner, Note: *Would I Lie To You? The Sixth Circuit Joins the 'Exculpatory No' Controversy in United States v. Steele*, 81 KY. L.J. 213 (1992-93); Timothy Nicholson, Note, *Just Say 'No': An Analysis of the 'Exculpatory No' Doctrine*, 39 WASH. U. J. URB. & CONTEMP. L. 225 (1991); Giles Borch, Note, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U. CHI. L. REV. 1273 (1990).

302. See *United States v. Rogers*, 466 U.S. 475 (1984).

303. The statute does not apply to false statements made to a state agency if the federal government is not sufficiently involved in the particular state program. See *United States v. Holmes*, 111 F.3d 463 (6th Cir. 1997).

304. 514 U.S. 695 (1995).

305. See, e.g., *United States v. Masterpol*, 940 F.2d 760 (2d Cir. 1991) (After his conviction the defendant got two witnesses to write letters for him falsely recanting their trial testimony, and then had his lawyer offer one of the letters to the sentencing judge in the hope of influencing the sentence. He was then indicted and convicted for violating section 1001, but the Second Circuit reversed. Sentencing is an adjudicative function, so section 1001 did not apply at the time the statement was made.). The 1996 amendments still exempt statements made during adjudicative proceedings. See 18 U.S.C. § 1001(b).

the position that section 1001 did not apply to the introduction of false documents into evidence in a criminal case, because a contrary ruling might "undermine" the perjury statute, which was then limited by the "two-witness rule."<sup>306</sup> There is something ironic in the fact that the case that first suggested a judicial function exception expressed concern that section 1001 might otherwise be interpreted so broadly as to criminalize conduct that "*falls well within the boundary of responsible advocacy!*"<sup>307</sup> The opinion in *Morgan v. United States*<sup>308</sup> upheld the conviction of a lawyer impersonator<sup>309</sup> under section 1001 for concealing his true name, identity, and nonadmission to the bar, but did so on the basis that his lie was made to the court in a "housekeeping" or "administrative" context. The court opined:

We are certain that neither Congress nor the Supreme Court intended the statute to include traditional trial tactics within the statutory terms "conceals or covers up." . . . Does a defendant 'cover up . . . a material fact' when he pleads not guilty? Does an attorney 'cover up' when he moves to exclude hearsay testimony he knows to be true, or when he makes a summation on behalf of a client he knows to be guilty?<sup>310</sup>

Fortunately, we need not answer these nagging questions — for the time being — because the Supreme Court told us in *Hubbard* that the text of the statute makes the recognition of a "judicial function exception" quite unnecessary. In May 1996, a freshman congressman and former federal prosecutor introduced a bill to "overturn" *Hubbard* and make 18 U.S.C. section 1001 directly applicable to false statements made in court.<sup>311</sup> This provision did

306. *United States v. Erhardt*, 381 F.2d 173, 175 (1967). A stronger argument might be that the application of section 1001 to in-court statements might undermine the Congressional policy favoring "absolution [of] perjurers who retract under prescribed conditions to secure truth through correction of previously false testimony." George Aycock III, Note, *Nothing but the Truth: A Solution to the Current Inadequacies of the Federal Perjury Statutes*, 28 VAL. L. REV. 247, 279 (1993) (arguing against section 1621 prosecutions that could not be brought under section 1623 because of timely retraction).

307. *Hubbard*, 514 U.S. at 709. Compare such of the Model Rules of Prof'l Conduct as Rule 3.3(a)(1) & (4), 3.4(b) & (e), and 4.1.

308. 309 F.2d 234 (D.C. Cir. 1962), *cert denied*, 373 U.S. 917 (1963). Does *Morgan* survive *Hubbard*?

309. You would think we already have enough members of the bar impersonating lawyers.

310. *Morgan*, 309 F.2d at 237.

311. Harvey Berkman, *Bill to Ensnare 'Liars' May Widen Criminal Net: Critics Fear Lawyers Could Be Charged for Trial Tactics*, NAT'L L.J., July 10, 1995, at A9. These fears proved groundless. See *infra* note 312 and accompanying text..

not survive in the final form of the bill passed by Congress and signed by the President, however, to the vast relief of trial counsel everywhere.<sup>312</sup>

The "False Statements Accountability Act of 1996" could prove useful in other contexts to curb abuses that are beyond the reach of the perjury statutes. For example, scientific misconduct and fraud could be prosecuted under section 1001 as well as under section 287 (the "false claims" statute).<sup>313</sup> Scientific fraud and phony expert testimony have seldom been prosecuted as perjury.<sup>314</sup>

#### DESTRUCTION OF EVIDENCE AND OTHER FORENSIC MISCHIEF

So if all do their duty they need not fear harm.

William Blake, *The Chimney Sweeper* (1794)<sup>315</sup>

The law-trained reader will almost certainly recall reading the case of *Armory v. Delamirie*,<sup>316</sup> in which a poor chimney sweep took a ring that he had found to a jeweler, only to have the jeweler's lackey<sup>317</sup> pry the jewel from its setting and return only the setting. "What stone was that?" "Go away boy!" The chimney sweep was not amused — nor was he afraid! He went out and hired a mouthpiece! The case is usually assigned in the first year Property

312. See U.S.C. § 1001(b). This section specifically excludes "parties to a judicial proceeding, or that party's counsel, for statements, representations, writings, or documents submitted by such party or counsel to a judge or magistrate in that proceeding." *Id.*

313. See C. Beth Sise, Comment, *Scientific Misconduct in Academia: A Survey and Analysis of Applicable Law*, 28 SAN DIEGO L. REV. 401 (1991). See also Patricia Woolf, *Deception in Scientific Research*, 29 JURIMETRICS J. 67 (1988); 18 U.S.C. § 287 (1986). This statute provides:

Section 287. False, Fictitious, or Fraudulent Claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

*Id.*

314. For a discussion of the scientist, the expert witness, and perjury, see Underwood, "X-Spurt" Witnesses, *supra* note 85; Paul Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439 (1997).

315. WILLIAM BLAKE, SONGS OF INNOCENCE AND EXPERIENCE (The Folio Society, London, 1992 ed.)

316. 1 Strange 505 (K.B. 1722).

317. Delamarie was a famous goldsmith of the time.

Law course. Few recognize that the case is one of the earliest Anglo-American cases dealing with the subject of *spoliation* — the deliberate destruction of evidence, and the evidentiary inference that may be drawn therefrom.<sup>318</sup> They probably *do* remember (I hope!) that the chimney sweep won the case.

The “bigger net” we have been talking about is now available to sweep up spoliators and persons who intimidate witnesses or procure their nonavailability, including attorneys who are not careful. Indeed, attorneys are particularly vulnerable to charges by opponents in civil cases, judges, and prosecutors in criminal cases — charges that are sometimes well-grounded<sup>319</sup> and *sometimes not so well grounded*.<sup>320</sup>

318. I refer the reader to that most excellent work by my favorite authors. See WILLIAM FORTUNE, RICHARD UNDERWOOD, and EDWARD IMWINKELRIED, *MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK* 235-38 (1996).

319. See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613 (S.D.N.Y. 1997). Compare *United States v. Conneaut Indus., Inc.*, 852 F. Supp. 116 (D. R.I. 1994) (corporate destruction of evidence and section 1512); *United States v. Davenport*, 622 F. Supp. 1523 (S.D.N.Y. 1985) (criminal defense attorney charged with subornation of perjury, intimidation of witnesses, engaging in misleading conduct to cause grand jury witnesses to evade subpoenaeas, etc.).

320. *Clark Equip. Co. v. Lift Parts Mfg. Co., Inc.*, 972 F.2d 817 (7th Cir. 1992) (unpublished disposition) 1987 WL 19150 (N.D. Ill., Oct. 27, 1987)) (trial judge sanctioned lawyer for supposedly participating in some kind of witness tampering and fabrication of evidence; appellate court applied mootness doctrine to deny the lawyer the opportunity for review of the trial judge's accusations). The reader may recall that the “Menendez Brother's” defense attorney, Leslie Abramson, was accused of improperly inducing a defense psychiatrist to delete material from his notes before the notes were turned over to the prosecution. It apparently is not uncommon for lawyers working with experts to make “suggestions” along these lines (whether proper or improper). See Underwood, “*X-Spurt*” *Witnesses*, *supra* note 85, at 391-403 (discussing *prosecutors'* misconduct in dealing with experts); CAROL JONES, *EXPERT WITNESSES* (Oxford: Clarendon Press, 1994) (discussing the relationship between lawyers and experts in Britain). The Los Angeles District Attorney ultimately decided not to pursue any charges against Abramson. See *Abramson Off the Hook*, *ATLANTA CONSTITUTION*, Oct. 12, 1997, at 23A. But early on, she was put in the position of invoking the Fifth under questioning from the court, and suffered a number of assaults in the press. See, e.g., *Abramson*, *CITY NEWS SVC. OF L.A.*, Apr. 25, 1996; *Menendez Expert Regrets Changing Notes at Insistence of Attorney*, *THE TESTIFYING EXPERT*, Vol. 4, No. 5 (May 1996); *Lawyer Defends Herself Against Accusations*, *TELEGRAPH HERALD* [DUBUQUE, IA], Apr. 22, 1996, at A9; *Facing the Court of Public Opinion*, *L.A. TIMES*, Apr. 19, 1996, at B1; *Judge Won't Remove Menendez Attorney*, *COMMERCIAL APPEAL* [MEMPHIS, TENN.], Apr. 10, 1996, at 8A; *Judge Keeps Abramson as Menendez's Lawyer . . .*, *L.A. TIMES*, Apr. 10, 1996, at A1; Peter Jennings, *ABC World News Tonight*, Apr. 9, 1996.

In her book, *The Defense Is Ready: Life in the Trenches of Criminal Law* (1977), Ms. Abramson dismissed the episode as a discovery dispute. Before the first trial, the expert had been instructed to edit out some materials that had already been disallowed by the court and make some clarifications — innocent changes to consist of “the obvious crossing out and adding that anyone reading them [could] see.” The expert apparently misunderstood and rewrote the entire pages “and even removed things [Ms. Abramson] had not discussed with

In my experience, lawyers are generally unaware of the fact that the new witness tampering statute, 18 U.S.C. section 1512, criminalizes a wide variety of coercive and *non-coercive* acts<sup>321</sup> intended to cause or induce a person to withhold testimony, records, documents, or other objects from an official proceeding; or cause or induce any person to alter, destroy, mutilate, or conceal any objects with intent to impair its integrity or availability or; cause or induce any person to evade process to appear or produce evidence in an official proceeding to absent themselves from an official proceeding to which they have been summoned.<sup>322</sup>

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him." *Id.* at 275. According to Ms. Abramson, by the time of the "flap," the prosecutor had both the edited and unedited versions; no harm intended; and in any event, no harm, no foul. I gather that Ms. Abramson is no longer under fire. The lesson I draw from this is that it is dangerous out there. And to quote Mr. Thomas Gray, even the most distinguished advocate should remember that "a Fav'rite has no friend(s)" — not in the press, anyway.

321. Consider the following ploy, described by Carberry, *supra* note 199, at 295 (citing KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (1985)):

[I]t is a common defense tactic [in white collar criminal cases] to coach a witness indirectly into obstruction of the investigation through destruction or non-production of subpoenaed documents. This is accomplished by telling the client specifically what the government is seeking and what is necessary for the government to discover to make its case. The client is then instructed to return to his company and gather the necessary documents responsive to the subpoena. The attorneys Mann interviewed admitted that many relevant documents are not produced because a 'smart' client will not give them to his attorney after such legal instructions.

*Id.* at 246-47.

Of course, some clients do not need a lawyer's instructions. Compare Jim Fitzgerald, *Probe Finds Documents Withheld in Texaco Case*, BUFFALO NEWS, July 15, 1997, at 3A (Executives stashed documents in a file neatly labeled, "Documents Withheld from Legal," not out of fear that a lawsuit would be lost, but because of hostility and distrust towards lawyers and the legal process!); Allanna Sullivan, *Texaco's Race-Bias Probe Finds 3 Executives Withheld Evidence*, WALL ST. J., July 15, 1997, at B12.

One also supposes that some clients will not hesitate to blame their lawyers, whether their lawyers were complicit or not. In an unbelievable turn of events, two former high-level Texaco officials were acquitted of obstruction of justice charges. See *United States v. Lundwall*, 66 USLW 1629 (S.D.N.Y., Apr. 1, 1998) (holding that U.S.C. section 1503 obstruction of justice statute can be used to prosecute individuals who conceal or destroy documents to impede discovery in civil cases). The full text of *Lundwall* can be found at <http://lw.bna.com/#0421>. Observers speculated that the jurors were persuaded by the argument that the defendants *had not been* "given (by Texaco's in-house lawyers?) the legal help they needed to understand what was expected of them" (emphasis added). It seems incredible that in-house attorneys should be blamed by the jury for not "educating" corporate executives on such fundamentals. *Quid iurores non faciunt?* (What a jury won't do?) See HERALD-LEADER [LEXINGTON, KY.], May 13, 1998, at C1, C6; Stanley Arkin, *Business Crimes*, N.Y.L.J., Apr. 9, 1998, at 3 (discussing the criminal implications of perjury in civil cases). As Artemis Quibble once observed, "[N]o fact is too patent to be denied." THE ADVENTURES OF ARTEMIS QUIBBLE 83 (1925).

322. 18 U.S.C. § 1512(b)(2)(A)-(D). That almost covers the waterfront. *But see* *United States v. Masterpol*, 940 F.2d 760 (2d Cir. 1991) (holding that with the 1988 amendments to section 1512, Congress clearly intended to move witness tampering from the reach of section

Furthermore, the new statute answers the pundits' question about whether a latter-day President Nixon could "destroy the tapes." Whatever one's view of the answer under old section 1503, the answer under section 1512 is that "*an official proceeding need not be pending or about to be instituted at the time of the offense; and the testimony, or the record, document, or other object need not be admissible in evidence or free from a claim of privilege.*"<sup>323</sup>

#### JUST DESSERTS? — SENTENCING UNDER THE GUIDELINES

Devotées of Doonesbury will remember a younger "B.D." (the guy who wears a football helmet at all times) sitting in front of the TV watching a "cops and robbers" show, and enjoying the announcement of the criminal's sentence at the end — "Here's the part I like. JUST DESSERTS!"

B.D. would love the United States Sentencing Guidelines ("U.S.S.G."), and would particularly enjoy the story of lawyer Stanford I. Atkin, whose case is a digression, but only a slight digression. Atkin was a proponent of a depressingly common scam. He would take large sums of money from a client, supposedly for the purpose of bribing the client's trial judge. He would not, in fact, bribe the judge. In this sort of case, if the outcome is favorable, the

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1503; and that there may be a hole in the legislative scheme that allows some kind of "nonmisleading, nonthreatening, nonintimidating attempt to have a person give false information" to slip through the net).

It is important to note here that the holding in *Lundwall* (see *supra* note 321 — section 1503 applies to civil (as well as criminal) obstruction of justice) directly contradicts the new survey in *White Collar Crime*, 35 AM. CRIM. L. REV. 989, 998, 1008-09 (1998) (suggesting that neither section 1503 nor section 1512 applies to civil cases). Despite the fact that these statutes are contained in Title 18, both statutes are clearly applicable to civil cases. See Stephen Gillers, *The Perjury Loophole*, N.Y. TIMES, Feb. 18, 1998 (citing *United States v. McAfee*, 8 F.3d 1010 (5th Cir. 1993); *United States v. Donathan*, 65 F.3d 537 (6th Cir. 1995); *United States v. Holland*, 22 F.3d 1040 (11th Cir. 1994), *cert. denied* 513 U.S. 1109 (1995)). "We categorically reject any suggestion, implicit or otherwise, that perjury is somehow less serious when made in a civil proceeding. Perjury, regardless of the setting, is a serious offense that results in incalculable harm to the functioning and integrity of the legal system as well as to private individuals." *Id.* (citing *United States v. Holland*, 22 F.3d 1040, 1047 (11th Cir. 1994). Congress agrees — the definition of "official proceedings" under sections 1503 and 1512 does not explicitly distinguish between civil and criminal cases, and thus, seems to include *any* judicial proceeding. To explain the fact that perjury in civil proceedings is rarely prosecuted, Paul Robinson, a law professor at Northwestern, surmised, "It's not that U.S. attorneys don't think lying in civil cases is a crime. But proving such charges is usually so difficult that prosecutors don't take the time to try [because of their heavy caseloads]." Kate Shatzkin, *Perjury Is a Crime Seldom Prosecuted; Legal Experts Differ on How to Treat Clinton*, BALTIMORE SUN, Jan 27, 1998, at 4A.

323. 18 U.S.C.A. § 1512(e)(1) & (2). For a case involving an attorney, see *United States v. Davenport*, 622 F. Supp. 1523 (S.D.N.Y. 1985).

client is presumably satisfied, and none the wiser. If the outcome is unfavorable, what's the client to do? Demand his money back? Well, sometimes things take an odd turn, and the client actually lodges a complaint in return for a deal. One of Atkin's convicted clients escaped from prison, was recaptured, and turned on Atkin. Atkin was convicted of obstruction of justice and money laundering. He was actually acquitted of a charge of witness tampering in violation of section 1512, and that is why discussion of his case may appear to involve a bit of a digression. But the case is relevant, because his sentence was enhanced under U.S.S.G. section 3B1.3, which provides for enhancement "if the defendant . . . used a special skill, in a manner that significantly facilitated the commission or concealment of the offense."<sup>324</sup> Although Atkin never did bribe the judge (the judge was unaware of the scam and did nothing wrong), the evidence showed that the client had selected Atkin because he was a "friend" of the judge and because he was a lawyer. Atkin also made an unsuccessful, but cryptic, pass at soliciting the judge's aid for his client in the course of a conversation in the judge's chambers, and had the client make the "bribe" payable to the lawyer's trust account. The visit to chambers in the role of attorney, and use of the trust account, involved special lawyer status or skills (skills?) and may also have precluded suspicion or further inquiry. The Sixth Circuit affirmed enhancement of the sentence under section 3B1.3!<sup>325</sup> Lawyers beware of yet another "most biting law!"

When a defendant is convicted of perjury, the sentence may be enhanced on a variety of grounds. For example, the judge may conclude that the perjury "resulted in substantial interference with the administration of justice"<sup>326</sup> or tended to conceal evidence.<sup>327</sup> But that is not all there is to enhancement.

Prior to the adoption of the U.S.S.G., federal judges were also allowed to consider, in sentencing a defendant, conduct of the defendant for which he or she was not convicted. For example, in *United States v. Grayson*,<sup>328</sup> the Supreme Court held that a sentencing judge could weight the defendant's uncharged perjury when sentencing that defendant for escape from prison. The Court

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324. U.S.S.G. § 3B1.3 (1996).

325. *United States v. Atkin*, 107 F.3d 1213 (6th Cir. 1997).

326. U.S.S.G. § 2J1.3(b)(2) (1996).

327. U.S.S.G. § 2J1.3(c)(1) (1996). I am using as my reference MARCIA SHEIN, SENTENCING DEFENSE MANUAL: ADVOCACY, PRACTICE & PROCEDURE (1997).

328. 438 U.S. 41 (1978).

stated that its ruling was based in part on the relevance of the uncharged conduct on the issue of defendant's prospects for rehabilitation; and in part on the practical inability of appellate review to prevent the use of "firsthand observations of perjury!" These views were restated in the 1993 case of *Dunnigan v. United States*,<sup>329</sup> in which the Court stated that sentence enhancement under the Guidelines based on uncharged perjury is "more than a mere [and presumably impermissible] surrogate for a perjury prosecution . . . [furthering] . . . legitimate sentencing goals relating to the principal crime."<sup>330</sup>

Still, there may be some limits. In *United States v. Sassanelli*,<sup>331</sup> the defendant stood convicted of mail fraud and interstate transportation of a check that had been obtained by fraud and money laundering. The trial judge enhanced the sentence for obstruction of justice,<sup>332</sup> making the "finding" that the defendant had perjured himself at trial.

[A]lmost everything that Mr. Sassanelli said was contrary to what the Court believes were the facts in this particular matter, as articulated by the other witnesses. And therefore, the Court believes, number one, that there is no double-dipping [double punishment] so to speak, because on the perjury charge itself there's [sic] no points added. And as to the perjury at the time of trial, the Court believes that the two points should be added in and will do.<sup>333</sup>

In prior cases, the Sixth Circuit had held that the sentencing judge could not merely rely upon the jury verdict, but instead must make a specific finding that the defendant committed perjury.<sup>334</sup> That means that the court must lay out in the record some specific

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329. 507 U.S. 87 (1993).

330. *Dunnigan*, 507 U.S. at 97. See also Barry Johnson, *If at First You Don't Succeed — Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153 (1996). The uninitiated may be even more surprised by the possibility that uncharged or unconvicted conduct might be used to enhance a sentence for another conviction, and then subsequently provide the basis for another charge and conviction. That is, the Double Jeopardy Clause apparently does not preclude the government from seeking to punish a defendant for the same conduct that was previously used to enhance a sentence. See *United States v. Grisanti*, 116 F.3d 984 (2d Cir. 1997) (collecting cases).

331. 118 F.3d 495 (6th Cir. 1997) (in this case the Sixth Circuit adopted the view that materiality is a question of fact for the jury).

332. U.S.S.G. § 3C1.1 (1996), which provides for enhancement if the defendant committed, suborned, or attempted to suborn perjury.

333. *Sassanelli*, 118 F.3d at 500.

334. See *Mathews v. United States*, 11 F.3d 583 (6th Cir. 1991).



instances of conflicting testimony and identify the portions of the defendant's testimony that were materially perjurious<sup>335</sup> — that is, a finding that “encompasses all of the factual predicates for a finding of perjury.”<sup>336</sup> Under this standard, it was necessary that the reviewing court reverse Sassanelli's sentence and remand the case for further proceedings. One assumes that this fish was reeled back in later.

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335. *Sassanelli*, 118 F.3d at 501 (citing *United States v. Spears*, 49 F.3d 1136, 1143 (6th Cir. 1995)).

336. *Id.* (citing *United States v. Comer*, 93 F.3d 1271, 1282 (6th Cir. 1996)).